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TRADE AND DEVELOPMENT BOARD
Committee on Shipping
Working Group on International
Shipping Legislation
Thirteenth session
Geneva, 11 November 1991
Item 2 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK

Provisional agenda, annotations to the provisional agenda, suggestions for the organization of work

Note by the UNCTAD secretariat

I. PROVISIONAL AGENDA

1. Election of officers
2. Adoption of the agenda and organization of work
3. General average
4. Provisional agenda and date of the fourteenth session of the Working Group
5. Other business
6. Adoption of the report of the Working Group to the Committee on Shipping.

GE.91-51410/1612H

II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Item 1: Election of officers

1. According to the rules of procedure of the Commiteee on Shipping, which apply as appropriate to the proceedings of the Working Group, 1/ the Group shall, at the commencement of the first meeting of the session, elect its officers, who shall constitute the Bureau of the Working Group. 2/

2. In accordance with resolution 40 (IX) of the Committee on Shipping, as from the seventh session of the Working Group, the members of the Group shall be the members of the Committee. Since that session, the Group has consequently elected a Bureau of similar size and constitution to that of the Committee on Shipping: a Chairman, five Vice-Chairmen and a Rapporteur. In accordance with the cycle of rotation for the Committee on Shipping, which the Working Group agreed to follow at its first session, the Chairman of the Working Group for the thirteenth session (the sixth of a seven session cycle) is to be elected from among the representatives of members of List C (Latin America) and the Rapporteur from List A (Asia). One Vice-Chairman is to be elected from List B, one from List D and three from Lists A and C combined.

Item 2: Adoption of the agenda and organization of work

3. The draft provisional agenda for the thirteenth session, submitted to the Working Group for consideration at its twelfth session, includes the subject of general average. 3/

4. The Working Group may, in accordance with previous practice, 4/ after a brief meeting of the Working Group as a whole to elect its officers and adopt its agenda, constitute a subgroup of experts to deal with the substantive work on general average. Of the seven working days available to the Group, it is proposed that six days be devoted to the consideration of the substantive item (item 3) and that, on the last working day of the session, the Working Group as a whole should meet to consider and to adopt the report of the Working Group.

5. In constituting the subgroup of experts, the Working Group will no doubt wish to follow the same procedures as were established at its seventh session for the first subgroup. 5/

6. After adopting its agenda, the Working Group may wish, in the light of the above, to take decisions concerning the organization of its work. Section III of this note contains suggestions in that connection.

Item 3: General average

7. Resolution 7 (III) of the Committee on Shipping, which established the Working Group on International Shipping Legislation (WGISL), recommended that the Working Group should include, inter alia, the subject of general average in its work programme.

8. At its first session, held in 1969, the Working Group adopted its work programme, including the subject of general average.

9. The Committee on Shipping at its tenth session adopted resolution 49 (X) in which it amended the work programme of the Working Group and included the subject of general average.

10. To assist the Working Group in its consideration of the subject, the UNCTAD secretariat has prepared a report entitled "General average - a preliminary review" (TD/B/C.4/ISL/58).

Item 4: Provisional agenda and date of the fourteenth session of the Working Group

11. In accordance with rule 8 of the rules of procedure of the main Committees of the Board, the Secretary-General of UNCTAD will submit, during the thirteenth session of the Working Group, a draft provisional agenda for the fourteenth session.

Item 5: Other business

Item 6: Adoption of the report of the Working Group to the Committee on Shipping

12. The report of the Working Group will be considered by the Committee on Shipping at its fifteenth session.

III. SUGGESTION FOR THE ORGANIZATION OF WORK

13. The Working Group has seven working days, from 11 to 19 November 1991, in which to complete its work. The morning of the first day, 11 November, is to be devoted to a meeting of the Group as a whole in order to elect its officers, adopt its agenda and organize its work for the session. The tentative schedule below has been drawn up on the basis of the suggestion made in paragraph 4 above that a subgroup of experts on general average be constituted to carry out the substantive work. It is accordingly suggested that the subgroup of experts commence its work in the afternoon of 11 November. On 19 November, the last day of the session, the Working Group as a whole should meet to assess the work of its subgroup and to adopt the report of the Working Group.

14. Throughout the session, facilities will be available for morning and afternoon meetings, with interpretation. It is suggested that, as a rule, meetings be held in the morning from 10 a.m. to 1 p.m., and in the afternoon, from 3 p.m. to 6 p.m. Limited facilities for meetings of regional groups will be available during the session. Informal consultations may be held during part of the morning of 11 November, before the opening of the session, and facilities for such meetings will be available on request.

15. It would help to expedite the proceedings if any written proposals were submitted as early as possible in the session.

PROPOSED SCHEDULE OF MEETINGS

First week:			
Monday 11 November 1991	a.m.	Plenary of the Working Group	
		Item 1:	Election of officers
		Item 2:	Adoption of the agenda and organization of work
	p.m.	Subgroup of experts	
		Item 3:	General average
Tuesday 12 November	a.m./p.m.		Idem
Wednesday 13 November	a.m./p.m.		Idem
Thursday 14 November	a.m./p.m.		Idem
Friday 15 November	a.m./p.m.		Idem
Second week			
Monday 18 November	a.m./p.m.		Idem
Tuesday 19 November	a.m./p.m.	Plenary of the Working Group	
		Item 3:	General average
		Item 4:	Provisional agenda and date of the fourteenth session of the Working Group
		Item 5:	Other business
		Item 6:	Adoption of the report of the Working Group to the Committee on Shipping.

Notes

1/ See TD/B/289-TD/B/C.4/ISL/4, paragraph 41.

2/ See rule 18 and rule 63, paragraph 2, of the rules of procedure of the main Committees of the Board (TD/B/740).

3/ See TD/B/C.4/338-TD/B/C.4/ISL/56, annex II.

4/ An exception was made by the Working Group at its twelfth session, when it decided to carry out the work on charter parties in plenary sessions.

5/ See TD/B/C.4/219-TD/B/C.4/ISL/32, paragraph 40.

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Committee on Shipping
Working Group on International
Shipping Legislation
Thirteenth session
Geneva, 11 November 1991
Item 2 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK

Provisional agenda, annotations to the provisional agenda, suggestions for the organization of work

Note by the UNCTAD secretariat

Corrigendum

Paragraph 2

Replace the last sentence with:

Two Vice-Chairmen are to be elected from List B, one from List D and two from Lists A and C combined.

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UNITED
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United Nations Conference
on Trade and Development

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TRADE AND DEVELOPMENT BOARD
Committee on Shipping
Working Group on International
Shipping Legislation
Thirteenth session
Geneva, 11 November 1991
Item 3 of the provisional agenda

GENERAL AVERAGE

A preliminary review

Report by the UNCTAD secretariat

GE.91-51506

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SURVEY OF THE QUALITY AND USEFULNESS OF UNCTAD PUBLICATIONS AND OF THEIR END-USERS

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Its quality, in terms of the following aspects *(tick one box in each case)*:

	Outstanding	*Excellent*	*Good*	*Adequate*	*Poor*
Presentation and readability	( )	( )	( )	( )	( )
Originality of ideas	( )	( )	( )	( )	( )
Wealth of information	( )	( )	( )	( )	( )
Up-to-date information	( )	( )	( )	( )	( )
Technical accuracy	( )	( )	( )	( )	( )
Quality of analysis, including objectivity	( )	( )	( )	( )	( )
Validity of conclusions	( )	( )	( )	( )	( )
Clarity of recommendations	( )	( )	( )	( )	( )
Comprehensiveness of coverage	( )	( )	( )	( )	( )

6. **Other observations** *(if any)* . . . . . .

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Finally, we would appreciate it if you could provide the following information about yourself:

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GENERAL AVERAGE - A PRELIMINARY REVIEW

INTRODUCTION

1. In pursuance of Conference resolution 14(II) the Committee on Shipping at its third session established, under resolution 7(III), the Working Group on International Shipping Legislation (WGISL) and recommended that the Working Group should include, inter alia, the subject of general average in its work programme.1/

2. At its first session, held in 1969, the WGISL adopted a work programme that included general average. In drawing up its work programme, the WGISL had before it a report prepared by the UNCTAD secretariat which stated that,

> "In regard to general average, the Working Group might consider the possibility of simplifying general average procedure and the York-Antwerp Rules which are difficult to understand and even more difficult to apply. Average adjustment is a notoriously complicated and time-consuming process and its ultimate incidences fall upon the underwriters representing the different interests. These underwriters often belong to different departments or subsidiaries of the same insurance company or group. The task of 'adjustment' is so difficult that a considerable 'mystique' has grown up around the subject and a specialized body of highly trained professional 'average adjusters' is employed to do full justice to it. All this is expensive and is eventually reflected on freight. Whether it would be an advantage to abolish general average altogether and let the loss lie where it falls so that the particular underwriter of the interest concerned bears the burden, is another question which the Working Group might feel deserves thorough investigation ... The Working Group may conclude that in view of the extreme complexity of the issues involved, and in consonance with recent practice in the insurance market, it might be advisable to study first prospects of simplifying general average procedures, and later to go on to study the reduction or abolition of contributions in selected instances where the equitable principle of beneficiaries proportionately absorbing costs incurred in their common interest may be found to have least value. The Working Group might then perhaps go on to tackle the economic effects of particularly contentious situations which nearly always cause difficulty in general average and where stage practices vary, as for example in 'port of refuge, or call situations'."2/

3. Resolution 49(X) of the Committee on Shipping, which amended the work programme of the WGISL, also included general average.3/ The WGISL at its twelfth session held in October 1990 decided to place general average on the agenda of its thirteenth session.4/

1/ See Official Records of the Trade and Development Board, Ninth Session (TD/B/240 - TD/B/C.4/55, annex 1).

2/ "Working Paper on International Shipping Legislation" (TD/B/C.4/ISL/2), para 43).

3/ See Official Records of the Trade and Development Board, Twenty-fifth Session (TD/B/921 - TD/B/C.4/254), annex I, p 51.

4/ See the Report of the WGISL on its twelfth session, TD/B/C.4/338, TD/B/C.4/ISL.56, annex II, p 24.

Summary and conclusions

4. This preliminary report has been prepared by the secretariat in order to facilitate the deliberations of the WGISL. It does not intend to provide a comprehensive analysis of the law or practice of general average. The report is divided into two parts. Part one, consisting of five chapters, seeks to explain the subject of general average. Chapter I provides some historical background, including the origin of general average and the attempts to create international uniformity on the subject through adoption of the York-Antwerp Rules. Chapter II looks at the definition and general principles of general average, including conditions required to constitute a general average act. Chapter III deals with general average acts which include general average sacrifice of cargo, ship and freight, as well as general average expenditure. Chapter IV is confined to general average contribution and adjustment of general average. Chapter V deals with the recovery of general average contribution and the question of security, namely general average bonds, underwriters' guarantees, bank guarantees and cash deposits. Throughout part one of the report, references are made to the provisions of the York-Antwerp Rules by way of illustration.

5. Part two of the report is confined to the review of criticisms of, and support for, the general average system, as well as alternative schemes which have been proposed from time to time. Chapter VI, therefore, looks at the criticisms which have been directed against the general average system over the past 100 years, together with the arguments advanced in favour of the system. Chapter VII deals with alternative systems which have been proposed in an attempt to eliminate the disadvantages and problems of the general average system.

6. Part three contains conclusions and recommendations. The report refers, inter alia, to the study of general average carried out by the CMI Working Group in 1982, which concluded with the observation that there was no enthusiasm for the reform of general average and that new insurance solutions should be sought in order to eliminate the disadvantages of the existing system. The report concludes that it would be premature for the WGISL to consider questions of the simplification or reform of general average until, as the CMI Working Group suggested, the "technical and service" problems had been thoroughly discussed by the insurance interests concerned. It therefore recommended that the UNCTAD secretariat should, in consultation with the Comité Maritime International (CMI), approach the insurance industry with a view to organizing investigations between the insurance interests, in order to determine whether new insurance solutions could be found which would allow the abolition of the general average system. If new insurance arrangements could, in practical terms, provide a more efficient and less costly substitute to the general average system, then investigations would have to be made of the best means of effecting its abolition. If, on the other hand, the insurance interests were to conclude after thorough investigation that there was no viable insurance solution, it would then be appropriate to consider, as a second stage, how best the general average system and the York-Antwerp Rules might be simplified, reformed or updated.

Activities of the Comité Maritime International (CMI)

7. The involvement of the CMI with general average goes back prior to 1950, when it undertook the revision of the York-Antwerp Rules 1924. The revised Rules, named "The York-Antwerp Rules 1950", were again amended by the CMI in 1974.

8. After the adoption of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), a Working Group on General Average was set up by the CMI in order to study "General average in the light of the Hamburg Rules". The terms of reference of this Working Group were later extended to include the study of general average without any restrictions. The Working Group prepared a report in October 1982 which considered the current practice, its disadvantages and problems and alternative solutions, including its abolition and replacement by an insurance system. The Working Group concluded that solutions to current problems were more likely to be found in new insurance arrangements than in other possible reforms to either of the principles on which general average is based or of the law. It therefore considered that because the scope for legal reform was small the subject might be best discussed as a technical and service problem between insurance interests rather than by lawyers.

9. The 1989 International Convention on Salvage introduced a new concept of "special compensation" which is payable by the shipowner to a salvor who has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment.5/ The Convention contains an attachment 6/ which requests the Secretary-General of the International Maritime Organization (IMO) to take appropriate steps towards speedy amendment of the York-Antwerp Rules 1974, so as to ensure that special compensation paid under Article 14 was not subject to general average. The IMO Secretary-General, however, requested the CMI to take the necessary measures to amend the York-Antwerp Rules 1974.

10. An International Sub-Committee was therefore established by the CMI which revised Rule VI of the York-Antwerp Rules, dealing with salvage. Draft Rule VI was then adopted by the CMI Conference held in June 1990.

11. Following the Conference, the CMI Assembly decided that the Executive Council should consider the possibility of a wider revision of the York-Antwerp Rules. The CMI Executive Council, upon consideration of a preliminary report submitted by the Chairman of the International Sub-Committee charged with responsibility for amending Rule VI of the York-Antwerp Rules, decided that an International Sub-Committee should be entrusted with the task of studying the law of general average and the York-Antwerp Rules and to submit any recommendations it might deem appropriate on the status of such law and on the possible need for an updating or a revision of the York-Antwerp Rules. The UNCTAD secretariat has been invited to participate in the work of the International Sub-Committee, and it is envisaged that there will be co-operation between the two organizations concerning any future work on the subject.

5/ Article 14.

6/ See attachment 2.

Part one

Chapter I

HISTORICAL BACKGROUND

A. The origin of general average

12. Prima facie, all losses occurring in the course, or in respect, of navigation lie where they originally fall. The doctrine of general average is an exception to this principle, upon which any sacrifice deliberately and voluntarily made, or any expense reasonably incurred, to prevent a total or some greater loss, such sacrifice or expenditure is the subject of general average contribution, and is rateably borne by the owners of the ship, freight and cargo, so that the loss may fall equally on all.7/

13. The application of this ancient rule of maritime law was known to the Rhodians, whose regulations on the subject were adopted into Roman civil law, and thus incorporated into the Digest of Justinian, which states:

> "Rhodian law decrees that, if goods are thrown overboard to lighten a ship, all shall make good by contribution that which has been given for all".8/

14. The principle, having been developed in Roman law, became part of many maritime law systems in the Middle Ages.9/ It was further extended and embodied in the majority of European maritime codes and found its way into the Common Law of England.

15. Although the article in Rhodian law speaks only of jettison, the principle contained in it has been considered wide enough to be applied to all other cases of voluntary sacrifice made and expenditure incurred for the benefit of all.

B. York-Antwerp Rules

16. While the principle of general average as originating in Rhodian law was adopted in all maritime countries and acted upon in their courts, yet in its application different countries adopted different rules.10/ Therefore, what constituted a general average loss or method of calculation, or contribution to the loss, varied in different countries, which greatly affected the parties engaged in overseas trade.

7/ See Fletcher v Alexander (1863) L.R.3C, p 375-381.

8/ Digest XIV.2.1.

9/ See the Rules (or Judgements) of Oleron, Arts 8-9-35 and the Laws of Wisbuy, Arts 20-21; Black Book of Admiralty, Sir Trevor Twiss (1876) Vol IV, p 271. As to other ancient sea laws of Europe, see Lowndes (R), The Law of General Average (1873), 1st edition, Appendix A, p 301.

10/ See Fletcher v Alexander (1868) L.R.3C, p 375-381.

17. Attempts were made to create international uniformity by setting up some international rules on the subject. The first step was taken in 1860 under the auspices of the National Association for Promotion of Social Science, resulting in a series of international conferences, the first of which was held at Glasgow in September 1860.11/

18. The Glasgow Conference agreed on a number of resolutions with the objective of establishing a uniform codification of the law of general average for introduction into the legislation of all maritime nations. A draft Bill was thereafter drawn up for the consideration of the Third International General Average Congress held at York in 1864. The Congress agreed on eleven Rules known as "The York Rules". It also recommended that the legislative authorities of the countries concerned should consider enacting them into their national laws; and, pending legislation, clauses should be introduced into charter parties and bills of lading to incorporate the Rules.

19. The York Rules were amended at a conference held in 1877 at Antwerp and a twelfth Rule was added. From this time they came to be known as "The York and Antwerp Rules".12/ The Rules were incorporated into a large number of charter parties, bills of lading and policies of marine insurance and were widely used. The idea of enacting them was consequently abandoned.

20. The Rules, having been in use for some years, were further amended and enlarged at a conference of the Association for the Reform and Codification of the Law of Nations, held at Liverpool in 1890. The revised Rules, which had been extended to 18, were entitled "The York-Antwerp Rules 1890".

21. The 1890 Rules proved to be inadequate in the light of changing trade conditions. They "did not by any means cover the whole area of disputed territory. They consisted merely of a group of rules dealing with certain specific points - points upon which the law or practice was known to differ at the time when the first conferences on the subject were held, added to or amended at succeeding conferences in the light of further experience of their working or the development of commercial requirements. The rules were based on no coherent and logical principle."13/ Thus further movements began, under the initiative of an English judge (Dowdall) for the preparation of a complete general average code for international adoption. The work was interrupted by the First World War and when it was resumed there was no longer any enthusiasm for establishing an international code on general average. There was, however, a willingness to both revise the 1890 Rules and to include statements of general principles.

11/ See Lowndes & Rudolf, The Law of General Average & The York-Antwerp Rules (London, Sweet & Maxwell) 1990, 11th edition, para 00.64.

12/ There was, however, very strong opposition from Lloyds' for adopting the York Rules as a basis for discussion, proposing that "uniformity could best be achieved by the abolition of general average". See Lowndes & Rudolf, op. cit., para 00.75.

13/ Lowndes & Rudolf, op. cit., para 00.81.

22. In 1924 the Conference of the International Law Association (previously known as the Association for the Reform and Codification of the Law of Nations), held at Stockholm, revised the 1890 Rules and also adopted a general declaration of the principles of general average to be applied in those cases which were not covered by the numbered rules. These principles were set out in seven lettered rules (Rules A to G). The principles and the specific rules "were thus put beside each other without any real coherence. In spite of the fact that the Rules in insurance circles 'met with a very general measure of approval', it was clear that they invited great problems of construction".14/ Such a problem arose in the case of Vlassopoulos v British & Foreign Marine Insurance Co (The Makis).15/ In this case an English judge decided that the lettered rules constituted the general rules and the numbered rules were to apply to particular cases. Consequently there could be no general average case within the particular rules unless it would also be covered by the provisions of general rules. This interpretation was clearly contrary to the intention of the drafters of the 1924 Rules. An agreement was, therefore, drawn up known as "The Makis Agreement", to counter the court's decision.

23. The 1924 Rules did not receive support and approval from the United States, one reason being that the definition of a general average act in Rule A restricted general average to sacrifices made or expenses incurred for the common safety and did not cover expenses made for the "preservation of the voyage", which is allowed in general average under United States law.16/ Consequently many general average clauses expressly provided for partial incorporation of the Rules, omitting all lettered rules except Rule F dealing with substituted expenses.17/

24. The 1950 revision of the Rules, which was carried out by the Comité Maritime International (CMI), included a new "Rule of Interpretation", introducing the "Makis Agreement" into the Rules. It read:

> "In the adjustment of general average the following lettered and numbered rules shall apply to the exclusion of any law and practice inconsistent therewith. Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules."

14/ K S Selmer, The Survival of General Average - A Necessity or an Anachronism? (Oslo University Press) 1958, p 56.

15/ (1929) 1 K.B. 187, (1928) 31 Ll.L. Rep 313.

16/ See A L Parks, The Law and Practice of Marine Insurance and Average (Stevens & Sons, London) 1988, Vol 1, p 493, note 40).

17/ For example, clause 19 in the New York Produce Exchange Charter Party (1946 revision) reads: "... general average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, ...".

25. The 1950 Rules were subject to further amendments in 1974 by the CMI at a conference held in Hamburg. The most recent revision was undertaken again by the CMI in June 1990 at a conference held in Paris, where Rule VI was amended. This was carried out at the request of the IMO in order to bring it into line with the International Convention on Salvage 1989. The new text is referred to as the York-Antwerp Rules 1974, as amended 1990.18/

26. Thus the York-Antwerp Rules contain one Rule of Interpretation, seven lettered Rules of Principle (A to G) and 22 numbered Rules (I to XXII). They are generally incorporated into bills of lading, charter parties and policies of marine insurance. In most countries the Rules do not in themselves have any legal force, except by contract.19/ The parties can agree that general average should be settled according to the York-Antwerp Rules. They may also agree to adopt them subject to express or implied modification.20/

18/ For detailed information concerning the history and development of the Rules, see Lowndes & Rudolf, op. cit., paras 00.63-00.106.

19/ The York-Antwerp Rules have been incorporated into national legislation in some countries. For example, it is understood that they form part of the Scandinavian Maritime Codes. See P Johnson, Jr, A Comparison of General Average Law and the Status of Average Adjusters in Sweden and the United States, Journal of Maritime Law and Commerce, Vol 12, No 3, April 1981, p 365.

20/ See Goulandris Brothers v Goldman (1958) 1Q.B.77, pp 90-91.

Chapter II

DEFINITION AND GENERAL PRINCIPLES

A. Definition of general average

27. In 1801 in the case of Birkley v Presgrave21/ a leading English judge defined general average22/ in the following terms:

> "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested."

28. This definition was adopted in the subsequent cases.23/ The principles laid down by the cases were later codified in the Marine Insurance Act, 1906 of the United Kingdom, which in Section 66 defines "general average loss" and "general average act" as follows:

> "(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure".

29. The definition set out in Rule A of the York-Antwerp Rules 1974 is substantially the same as in the Marine Insurance Act of the United Kingdom. It reads:

> "There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

30. While English law and the York-Antwerp Rules (Rule A) restrict the general average to sacrifices made and expenses incurred for the common safety, the courts in the United States have also adopted the common benefit theory and the preservation of the adventure. Thus, expenses incurred, after the attainment of safety, for the benefit of ship and cargo to enable the voyage to be completed (such as temporary repair at a port of refuge) are made good in general average.24/

21/ (1801) 1 East 220, per Lawrence, J, at p 228).

22/ As to the origin and history of the word "average", see Lowndes & Rudolf, op. cit., para 00.12; Machlachlan, The Law of Merchant Shipping (1923), 6th edition, p 561).

23/ See Covington v Roberts (1806) 2B. & P.N.R., 378; Job v Langton (1856) 6 E. & B., 779-790; Svendsen v Wallace (1884) 13 Q.B.D., 69-73.

24/ See A Parks, The Law and Practice of Marine Insurance and Average, op. cit., pp 485-493.

31. It should, however, be noted that the term "general average" is used to signify, (i) the general average act, being the intentional voluntary sacrifice or expenditure made for the purpose of rescuing the ship, cargo and freight from a common danger; (ii) the general average loss, which occurs as a result of the general average act; and (iii) the general average contribution, which is a division of the loss among those benefitted.

B. General principles of general average

32. For a sacrifice or expenditure to be the subject of general average contribution, the following conditions are required:

1. The sacrifice or expenditure must be extraordinary

33. The general average sacrifice or expenditure must be of an extraordinary nature in order to be allowed in general average. In other words, if it arises out of ordinary measures taken in fulfilment of the carrier's obligations under the contract of carriage there can be no claim for general average contribution.25/

34. Rule A of the York-Antwerp Rules specifically restricts the scope of the general average act to any extraordinary sacrifice or expenditure made for the common safety. Rule VII provides a classic example of damage caused to the machinery and boilers of a ship which has gone ashore, being in a position of peril, in endeavouring to refloat. Such damage is allowed in general average provided it is shown to have arisen from an actual intention to refloat the ship for the common safety at risk of such damage. On the other hand, if a ship is afloat no loss or damage caused by working the propelling machinery and boilers is, in any circumstances, to be made good as general average.26/

2. Intentional and reasonable act

35. To constitute a general average act a sacrifice or expenditure must be intentionally and reasonably made or incurred for the common safety and to preserve from peril the property involved in a common maritime adventure (Rule A). The voluntary stranding of a vessel for the common safety and the deliberate scuttling of a vessel on fire, to put out the fire and to save the vessel and her cargo, are examples of voluntary sacrifice intentionally and reasonably made for the common safety.27/

36. If the property was already lost by some accident it cannot be considered as having been sacrificed. Thus, under Rule IV of the York-Antwerp Rules loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident are not to be made good as general average.

25/ See Arnould, Law of Marine Insurance and Average (Stevens & Sons, London), sixteenth edition, 1981, paras 920-921; Parks, The Law and Practice of Marine Insurance and Average, op. cit., pp 493-496. See also Robinson v Price (1876) 2Q.B.D.295; Wilson v Bank of Victoria (1867) L.R.2Q.B.203; Harrison v Bank of Australia (1872) L.R.77Ex.39.

26/ For the interpretation of Rule VII, see Lowndes & Rudolf, op. cit., paras 7.01-7.13.

27/ See Austin Friars SS Co v Spillers and Bakers Ltd (1951) 3 K.B.586; Lee v Grinnell 12 N.Y. Super Ct.400 (N.Y., 1856).

3. Common safety

37. Under Rule A of the York-Antwerp Rules the general average act must be made with a view to preserving from peril all interests involved in a common maritime adventure. Thus a sacrifice made or expenditure incurred for the safety of a part of the property involved in the adventure does not give rise to a claim for general average contribution, but will be a charge on the owner of the particular property preserved by such sacrifice or expenditure.28/

38. Although Rule A adopts the English view of limiting the scope of the general average act to attaining common safety and, unlike the United States law, does not extend the principle to include the common benefit and the safe prosecution of the voyage, yet certain numbered rules of the York-Antwerp Rules, such as Rules X(b) and XI(b) allow in general average certain expenditure of such nature. Since by virtue of the Rule of Interpretation the numbered Rules prevail over the lettered Rules, expenses incurred for the common benefit of the whole adventure and for the safe continuation of the voyage will be allowed under the York-Antwerp Rules.29/ Thus, the expenses allowed in general average are not limited to those incurred for the attainment of safety, but also include expenses incurred for the mutual benefit of ship and cargo to enable the voyage to be completed, such as temporary repairs and other expenses incurred in a port of refuge.

4. Preservation from peril

39. Rule A of the York-Antwerp Rules further requires that a sacrifice or expenditure, in order to constitute a general average act, must be made or incurred for preserving from peril property involved in a common maritime adventure. The peril, however, need not be of an imminent nature but it "must be real and not imaginary ... [and] it must be substantial and not merely slight or nugatory. In short, it must be a real danger".30/

28/ See Lowndes & Rudolf, op. cit., para A.105; Arnould, op. cit., para 918.

29/ See A Park, The Law and Practice of Marine Insurance and Average, op. cit., at p 499; Leslie J Buglass, General Average and The York-Antwerp Rules 1974, American Law and Practice, Cornell Maritime Press, Cambridge, Maryland, 1974, pp 13-14.

30/ Per Roche J, in Vlassopoulos v British and Foreign Marine Insurance Co Ltd (The Makis) (1929) 1K.B. 187-200.

Chapter III

GENERAL AVERAGE ACTS

40. General average losses arise from: (a) Sacrifice of the cargo, or part of the ship, for the common safety; (b) Expenditure incurred for the same purpose.

A. General average sacrifice

1. Sacrifice of cargo

41. The classic example of general average sacrifice of cargo is jettison. Jettison is defined by Rhodian Law as the throwing overboard of the cargo in order to lighten the ship,31/ and if it is made deliberately and for the purpose of saving the other interests from a real peril, it gives rise to a claim for general average contribution.

42. An exception to this rule is the case of jettison of cargo loaded on deck. This is because to give rise to a claim for general average contribution, the jettisoned cargo must have been loaded in an appropriate place. Since the deck is not ordinarily a proper stowage place for cargo, the jettison of goods loaded on deck does not entitle their owner to claim contribution. The exception, however, does not apply in cases where the cargo has been carried on deck according to an established custom of trade,32/ nor where the other interests in the adventure have consented that the cargo jettisoned should be carried on deck.33/

43. Another example of general average sacrifice of cargo is damage done through attempts to extinguish fire on board a ship. Thus, if water is poured into the ship's hold, or if the ship is scuttled, in order to put out a fire, damage caused to cargo thereby is made good in general average.34/ No compensation, however, is allowed for damage caused by smoke or heat. This principle, which also applies in case of damage to a ship, is exemplified in Rule III of the York-Antwerp Rules.35/

31/ See Dig.lib.14, tit.2,F.1.

32/ Rule I of the York-Antwerp Rules provides: "No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognized custom of the trade". Damage done by or in consequence of a sacrifice, or by water entering an opening made for the purpose of jettisoning cargo, is also allowed in general average under Rule II. For the interpretation of Rules I and II, see Lowndes & Rudolf, op. cit., paras 1.01-2.10

33/ See Strong v Scott (1889) 14 APP.Cas.601-609; The Freda 266F, 551 (S.D.N.Y.1918).

34/ See Whitecross Wire Co v Savill (1881) 8Q.B.D.653; Pirie v Middle Dock Co (1881) 44L.T.426).

35/ Rule III provides: "Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage by smoke or heat however caused."

44. Loss of, or damage to, cargo sustained in the course of discharging cargo is also treated as general average sacrifice of cargo provided that the act of discharging cargo is considered as a general average act.36/

2. **Sacrifice of ship**

45. Principles similar to those which apply in case of sacrifice of the cargo are also applicable to sacrifice of anything belonging to the ship. Thus, if part of the ship, her stores or tackle is sacrificed to avert a common danger, it will be the subject of a general average contribution. Ordinary losses sustained by the ship in the fulfilment of the contract of carriage are borne by the shipowner: only sacrifices made for the common safety are made good in general average.

46. Thus, damage done to a ship in extinguishing fire on board is allowed in general average.37/ Similarly, if a ship is deliberately stranded for the common safety, the resulting loss or damage is the subject of a general average contribution.38/ Furthermore, ships' materials and stores burnt for fuel, for the common safety at a time of peril, are allowed if sufficient fuel had been provided at the beginning of the voyage.39/ Sacrifices of parts of the ship, such as cutting away of cables and anchors in an attempt to avoid a common danger, are also permitted. However, loss or damage caused by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident are not allowed in general average.40/

3. **Sacrifice of freight**

Sacrifice of cargo/ship and loss of freight

47. Sacrifice of the cargo or the ship may also result in the loss of freight. If, under a charter party or bill of lading, freight is payable on delivery of the cargo, then a sacrifice of the cargo which results in its total loss, or in loss of its merchantable condition, will also cause loss of freight. It is not only the owners of the cargo who suffer loss by its sacrifice but also the shipowner, or the charterer if the charter party amounts to a bareboat or demise of the ship, who would otherwise have earned freight by carrying the cargo to the port of destination. Therefore, it is not only the loss of cargo which is made good in general average, but also the loss of freight so caused.

48. If the goods are jettisoned for the common safety, or if they are sold at a port of refuge for the procuring of funds to defray general average expenses, or if they are destroyed by water to extinguish a fire, and the freight payable in respect of them is thereby lost, the freight so lost is a general average loss and is made good in general average.41/

36/ See Rule XII of the York-Antwerp Rules.

37/ Rule III of the York-Antwerp Rules.

38/ Rule V of the York-Antwerp Rules.

39/ Rule IX of the York-Antwerp Rules.

40/ Rule IV of the York-Antwerp Rules.

41/ See Pirie v Middle Dock Co (1881) 44L.T.426.

49. Similarly, sacrifice of the ship may, in some cases, involve sacrifice of the freight. If, for example, a vessel is stranded or lost under circumstances which give rise to a claim in general average and the freight which the vessel would have earned is thereby lost, the freight so lost is regarded as general average sacrifice.42/

50. Sacrifice of cargo or ship will only cause loss of freight if the freight was at risk, that is, if it was being earned at the time of the general average act and its earning depended on the safety of the ship and cargo. Thus, sacrifice of the ship or her cargo will not involve loss of freight if, for example, freight is prepaid "ship or cargo lost or not lost".

51. Rule XV of the York-Antwerp Rules only covers loss of freight arising from damage to or loss of cargo. Loss of freight caused by damage to or loss of the ship is not made good under Rule XV, although, it is suggested, it may be made good under the lettered Rules.43/

52. The amount of freight lost by sacrifice of the cargo or the ship, and which ought to be made good by other interests saved, is ascertained by deducting from the amount of gross freight lost the expenses which the shipowner would have incurred to earn the freight but has not incurred because of the sacrifice.44/

B. General average expenditure

53. Any extraordinary expenditure incurred for the purpose of avoiding a danger which threatens the whole adventure will be the subject of general average contribution from other interests involved. General average expenditure may be described as sacrifice of money to avert a common danger as opposed to the physical loss of or damage to the property involved in the adventure.45/

54. It should be noted that the shipowner, in the performance of his contract of carriage, is bound to incur such expenses as may become necessary to enable him to complete the voyage. It may, therefore, be difficult to distinguish those expenditures which are the subject of general average contribution from those which fall upon the shipowner in fulfilment of his contractual obligations.

42/ See The Columbian Ins Co v Ashby (1839) 13 Peters.331.

43/ See Lowndes & Rudolf, op. cit., para 15.17.

44/ See second paragraph of Rule XV of the York-Antwerp Rules.

45/ See Ocean SS Co v Anderson (1883) 13Q.B.651-662; Kemp v Halliday (1865) 34L.J.Q.B.233-242; Lowndes & Rudolf, op. cit., para A.103.

55. The common examples of general average expenditures are salvage, whether under contract or otherwise,46/ port of refuge expenses47/ and substituted expenses, that is to say those expenses which are made in place of those which would have been allowable in general average if made.48/

56. Rules X and XI of the York-Antwerp Rules list port of refuge expenses and wages and maintenance of crew which are allowed in general average. According to Rule X of the York-Antwerp Rules, the expenses of entering a port of refuge or returning to a port or place of loading are admitted in general average when the port was entered in consequence of "accident, sacrifice or other extraordinary circumstances, which render that necessary for common safety."49/ Similarly, "The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage."50/ And "whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing such cargo, fuel or stores shall likewise be admitted as general average."51/

57. Furthermore, "wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average...".52/ Moreover, when a vessel has entered or been detained in any port or place "in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers or crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average".53/

46/ See Rule VI of the York-Antwerp Rules. For the interpretation of Rule VI, see Lowndes & Rudolf, op. cit., paras 6.12 to 6.27.

47/ Ibid, Rules X and XI. For the construction of these Rules, see Lowndes & Rudolf, op. cit., paras 10.32 to 11.37.

48/ Ibid, Rule F. For the construction of Rule F, see Lowndes & Rudolf, op. cit., paras F.1 to F.39.

49/ Rule X(a).

50/ Rule X(b).

51/ Rule X(c).

52/ Rule XI(a).

53/ Rule X(b).

Chapter IV

CONTRIBUTION AND ADJUSTMENT

A. Contribution to general average

58. The object of general average is to apportion the loss among the interests involved so that the loss does not lie where it has fallen. A party who has suffered loss is entitled to be compensated by a general contribution from all those who benefited, in proportion to the value of the property saved.54/ Thus every interest (ship, cargo, freight) which has benefitted from the general average act is liable to contribute.

59. The party who has suffered loss also contributes. In other words, the contribution is made among those whose property is saved and those who have suffered loss by sacrifice or expenditure, so as to put the person suffering loss in the same position as the owners of other interests. If the owner of the property sacrificed, or the person who incurred expenditure did not contribute but received the total value, he would be better off than the owners of other interests involved in the adventure.55/ Thus the total value of the loss or expenditure is not made good in general average, because the person who has suffered loss also bears his share of the contribution.

60. A person who has suffered loss cannot, however, claim a contribution for a general average sacrifice or expenditure if the peril which caused the sacrifice or expenditure was due to his own fault or neglect. Thus if part of the vessel itself, or its "stores or tackle", is sacrificed for the common safety, the shipowner may not claim a general average contribution from the owners of the cargo saved if the peril which caused the loss was brought about by his own breach of the contract of carriage. For example, if the shipowner, in breach of his contract of carriage, fails to make the ship seaworthy at the beginning of the voyage and such unseaworthiness causes the casualty giving rise to the general average act, he may not claim a general average contribution.

61. However, the fact that a general average act was necessitated by the fault of one of the parties to the adventure does not affect its general average character and contribution is due between the other parties to the adventure, but the party at fault is not entitled to claim a general average contribution. This is not only to avoid circuity of action, but also to prevent a person from taking advantage of his own wrongful act.56/

54/ There have been differences of opinion as to whether the right to contribution arises out of an implied contract or from the ancient maritime law. The view supported mostly by British judicial authorities is that it does not arise from any contract at all but from the old Rhodian law, and has become incorporated into the law of maritime nations. See Burton v English (1883) 12Q.B.D.218, per Brett, M R at pp 220-221; Strang Steel & Co v Scott (1899) 14A.C.601, pp 607-608.

55/ See Arnould, Law of Marine Insurance and Average, sixteenth ed, 1981, para 974.

56/ See Lowndes & Rudolf, op. cit., para D.02; see also Stang v Scott (1889) 14A.C.501; Schloss v Heriot (1863) 14C.B. (N.S.) 59; The Ettrick (1881) 6P.D. 127-135.

62. The "fault" in order to deprive a person from claiming contribution must, under English law, be "something which is wrongful in the eyes of the law, that is to say, something which constitutes an actionable wrong".57/ Thus if the shipowner is relieved by the contract of carriage from liability for unseaworthiness, his right to contribution cannot be affected if unseaworthiness necessitated general average sacrifice or expenditure, since the fault in such a case does not constitute an actionable wrong.58/

63. The above view, however, is not adopted by the courts in the United States. Before the Harter Act, any clause entitling a shipowner to general average contribution under such circumstances was considered invalid as being against public policy. In the case of The Irrawaddy,59/ the question was whether the Harter Act (Section 3) which relieved the shipowner from liability for "damage or loss resulting from faults or error in navigation" had the effect of enabling him to claim contribution to general average expenditure necessitated by negligent navigation. The Supreme Court held that the Act merely prevented him from becoming liable in damages but did not affect the general average claim. The same reasoning would apply in the United States under the Hague Rules, and the Hague-Visby Rules if they are expressly incorporated into the contract of carriage.

64. In an attempt to counteract the courts' decisions, clauses were introduced into contracts of carriage expressly allowing the shipowners to recover general average contribution in such circumstances. In the case of The Jason 60/ the United States Supreme Court finally upheld the validity of such clauses. Thus, a "New Jason Clause" is now almost invariably included in bills of lading and charter parties under which there is the possibility of adjustment taking place according to the United States law or any other similar law, to ensure that only his actionable fault will deprive the shipowner of the right to general average contribution.61/

65. This question is dealt with by the York-Antwerp Rules in Rule D which reads:

> "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault."

66. The Rule has been considered "the source of puzzlement and also of efforts by carriers to enforce contribution in general average although they were liable under the Hague Rules for loss or damage to cargo".62/

57/ Per Kennedy L J in Greenshields, Cowrie v Stephens (1908) 1K.B. at p 61.

58/ The Carron Park (1890) 15P.D. 203; Milburn v Jamaica Fruit Co (1900) 2Q.B.540.

59/ (1897) 171U.S.187.

60/ (1911) 225 U.S.32.

61/ For detailed information, see Buglass, Marine Insurance and General Average in the United States, 2nd edition, 1981, pp 290-294; Carver, op. cit., paras 1363-1374; Lowndes & Rudolf, op. cit., paras D.01-D.019.

62/ W Tetley, Marine Cargo Claims, 2nd edition, 1978, p 369.

67. Rule D has been interpreted in the English case of Goulandris v Goldman 63/ by Pearson J, who considered that:

> "The manifest objects of Rule D are to keep all questions of alleged fault outside the average adjustment and to preserve, unimpaired, the legal position at the stage of enforcement. The effect of the first part of the Rule is that the average adjustment is complied with on the assumption that the casualty has not been caused by anybody's fault ... But the second part of the Rule provides that the first part is not to prejudice remedies for faults."

68. The York-Antwerp Rules do not define the term "fault". As stated earlier under English law it means a legal wrong which is actionable as between the parties at the time the sacrifice or expenditure was made or incurred.64/ Similarly the word "remedies" is not defined and under English law it includes defences as well as cross claims.65/

B. Adjustment of general average

69. Unless specifically agreed otherwise, the adjustment of general average is made at the end of the voyage and according to the law prevailing in that port. Thus, if after the general average sacrifice or expenditure the whole adventure is lost there will be no contribution.66/ But if the voyage is terminated at an intermediate port, the general average adjustment is made at the place where the voyage is terminated.67/

70. In adjusting general average, the value of the general average loss which is to be made good and the value of each contributing interest needs to be ascertained. All interests which were at risk at the time of the general average act (usually ship, cargo and freight) will contribute upon the basis of their values which arrive at destination. The principle is confirmed in Rule G of the York-Antwerp Rules which provides that: "General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends."68/

71. A difficulty, however, arises when a vessel carries cargo to more than one destination and a general average loss occurs before the vessel arrives at the first port of discharge. Rule G does not seem to provide any answer to questions as to where, and on what values, adjustment is to take place in such circumstances.

63/ (1958) 1 Q.B.74.

64/ Ibid, p 104; see also Lowndes & Rudolf, op. cit., para D.27.

65/ Ibid, pp 93-100.

66/ Fletcher v Alexander (1868) L.R.3C.P. 375-382.

67/ Mavro v Ocean Mar. Ins. (1874) L.R.9C.P. 595, (1875) 10 C.P. 414; Hill v Willson (1879) 4P.C. 329.

68/ For the interpretation of Rule G, see Lowndes & Rudolf, op. cit., paras G.01-G.63.

72. Rule XVII of the York-Antwerp Rules deals more specifically with contributory values. The 1974 revision of this Rule brought about a fundamental change to the basis of assessing the contributory value of the cargo, by providing that "... the value of cargo shall be the value at the time of discharge ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value." Thus, instead of the market value prevailing on the last day of discharge, the contributory value of cargo is based on the invoice price to the receiver, including the cost of insurance and freight unless the freight is at risk to the carrier.

73. Furthermore, the contributory value of the ship is, under the Rule, based on her market value, irrespective of the beneficial or detrimental effect of any demise or time charter party to which the ship may be committed.

74. Freight, in order to be a contributory interest, must be at risk at the time when the general average act is performed. Freight pending or being earned at the time of general average act is the freight at risk, and contributes to the loss on the basis of the amount eventually earned. Thus, if payment of freight, under a bill of lading or charter party, is made payable upon the delivery of the cargo at the port of destination, then the freight is at the risk of the carrier and if it is saved by rescuing of the ship or cargo, it contributes to the general average loss.69/ On the other hand, if freight is paid in advance or if it is made payable at a certain time, "ship or cargo lost or not lost", then such freight is not at the risk of the carrier, but of the cargo owner and as such becomes merged in the value of the cargo and is not considered as a separate contributing interest.

75. In estimating the contributory value of freight, the expenses incurred in earning it, from the time the general average act is performed until the completion of cargo discharge at the final port of destination, are deducted from the amount of gross freight received.

76. Rule XVII of the York-Antwerp Rules merely deals with the contributory value of freight, without describing the circumstances in which freight contributes in general average.70/

69/ The "Dorothy Foster" (1805) 6C.Rob. 88-91.

70/ It provides that: "... deductions being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average."

Chapter V

RECOVERY OF GENERAL AVERAGE CONTRIBUTION

77. The person who has suffered loss may enforce his claim for contribution either by bringing an action against the interests benefited by the general average act or, if the shipowner or demise charterer, by exercise of his right of lien against the cargo owners.

78. Under some legal systems, shipowners have a lien on cargo for general average contribution and may retain the goods until the lien is satisfied or an alternative security is given by their owners. In some countries, however, no right of lien is recognized for general average contribution. Charter parties and bills of lading, therefore, usually contain a clause giving the shipowners a right of lien on the cargo.

79. The exercise of a lien not being practically convenient, it is usual for the master to release the goods upon taking some sort of security for recovery of general average contribution when it is adjusted.71/ The usual form of security is the giving of an average bond, together with a cash deposit, or a satisfactory guarantee from the underwriters of the goods or from a bank.

A. General average bonds

80. The general average bond, which is given in order to secure the release of the goods, is a contract entered into with the consignees whereby in consideration of the master agreeing to discharge the cargo without exercising his lien, the consignees agree to pay any general average contribution chargeable on the cargo.72/ It is a new independent contract by which the party signing it agrees to pay the general average contribution whatever it may be.73/

81. Thus, being a new contract it is enforceable against the person who has signed it regardless of whether the claim is time barred under the contract of carriage,74/ or whether the contract of carriage is dissolved for some reason, or that the person who signed it was not the owner of the cargo at the time of casualty.

82. In the English case of Hain SS Co v Tate & Lyle 75/ the indorsees of the bill of lading, who had purchased the goods after the general average act, in order to obtain delivery of the cargo made deposit of a sum of money and signed a Lloyd's average bond undertaking to pay the shipowner what might be found due as general average contribution to which "the shipper or owners" of

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71/ E B Aaby's Rederi A/S v The Union of India, The "Evje" (1973) Lloyd's Rep 509.

72/ Diestelkamp v Baynes (Reading) Ltd, The "Aga" (1968) Lloyd's Rep 431, per Donaldson J at p 434.

73/ E B Aaby's Rederi v The Union of India, The "Evje" (1973) Lloyd's Rep 509-514.

74/ The "Evje" (1973) Lloyd's Rep 509, (1974) 3W.L.R. 269.

75/ (1936) 41 Com.Cas. 350.

the cargo might be liable to contribute. Later, on discovering that there had been a deviation during the voyage, they brought an action to recover the sum which they had deposited. The House of Lords held that the indorsees of the bill of lading, not having waived the deviation, had the right to repudiate the contract of carriage under the bill of lading, and would not have been liable for a general average contribution, but as they had signed the average bond expressly undertaking to pay such a contribution if found due, the shipowners were entitled to retain out of the sum deposited their proper share of contribution in general average.

83. The Lloyd's standard form of average bond which is often used in practice provides that in consideration of the delivery of the goods, the signatory of the bond agrees to pay the proper proportion of any salvage and/or general average and/or special charges which may be due from the goods or the shipper or owners thereof, and also agrees to furnish particulars of the value of the goods required for the adjustment of general average.

B. Underwriters' guarantees

84. Security for the payment of general average contribution by cargo interests is normally provided by underwriters' guarantees instead of cash deposits. The provision of a guarantee is required in addition to the signature of an average bond by the cargo interests, and therefore both the average bond and guarantee must be signed in order to obtain release of the cargo.

85. Insurers and most average adjusters have their own form of underwriters' guarantee, since no standard form exists. The form issued by the Corporation of Lloyd's "guarantees the due payment to the shipowners of any contribution for general average and/or salvage and/or other charges which may be properly chargeable" against the goods.76/

C. Bank guarantees

86. Bank guarantees are usually required where either the goods are uninsured or if the cargo insurers are of doubtful standing. Guarantees provided by banks are treated in a similar manner to a loan and thus they are limited in terms of the amount and duration. Bank guarantees are often limited to a one-year period, although they may be renewed from year to year.

D. Cash deposits

87. Again, the shipowner may require the cargo interests to deposit cash as collateral security for payment of general average contribution which may ultimately be due from the goods, if the goods are uninsured, or if they are insured with a less reputable insurance company. The Lloyd's Form of Deposit Receipt is normally given to the depositor who may endorse it to his insurer and claim the amount of the deposit.77/ The deposit receipt is a transferable document of title which entitles the holder to present it to the average adjuster and to claim any balance due.

76/ For the Lloyd's guarantee form, see Lowndes & Rudolf, op. cit., Appendix 4, para 80.04.

77/ See Lowndes Y Rudolf, op. cit., paras 30.17-30.18.

88. Rule XXII of the York-Antwerp Rules deals with the treatment of cash deposits in the following terms:

> "Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by the cargo in respect of which the deposits have been collected. Payments on account or refund of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties."

89. The Rule does not place an obligation on the cargo interests to provide a cash deposit to secure the payment of general average contribution which may ultimately be due from the cargo. It only sets out what procedure should be followed if any deposit is in fact paid, and seeks to ensure that the interests of the cargo owner are protected.

Part two

Chapter VI

REVIEW OF CRITICISMS OF GENERAL AVERAGE

90. One of the leading authorities on shipping law in the United States has evaluated the concept of general average in the following terms:78/

> "Few features of maritime law can with any realism be questioned as to their fundamental right to exist. Changes may be proposed and may come, but there must (so long as modern commerce is recognisably the same) be a law of collision, of goods damage, of personal injuries, and so on.
>
> General average, on the other hand, is by no means self-evidently a necessary or useful institution on the whole. Its abolition would be thinkable, whether or not desirable. If it were abolished, no gap would be left that must indispensably be filled. Accordingly, there has been recurrent talk of the possibility of doing away with general average altogether, with suitable adjustments in hull, cargo and liability insurance coverage, and in related rules of carriers' liability."

91. The current editors of Lowndes and Rudolf on "The Law of General Average and The York-Antwerp Rules "hereinafter referred to as "Lowndes") in the most recent 1990 edition of that book, in considering the future of general average, put the question:

> "Is there still a continuing need and future for general average, or, as is sometimes claimed, has it possibly outgrown its original purpose and particularly in the liner trade, become too cumbersome, time-consuming and costly for the advantages it confers? Could the mercantile community manage without it? Or is is possible to find a simpler and more efficient alternative?"79/

92. In 1958, Professor Knut Selmer in "The Survival of General Average - a Necessity or an Anachronism?"80/ produced the most thorough and comprehensive critique of general average ever written. He concluded:

> " A consideration of the economic aspects of the general average distribution will favour a complete suppression of the entire institution, except for the apportionment of salvage money proper.
>
> The distribution of sacrifices and expenses is in no way necessary for the protection of shipowners and merchants against unforeseen losses, because they may always cover themselves by insurance. True enough, the existing policies would not give full security on the day general average was done away with, for an underwriter rarely assumes the full responsibility for expenses which also benefit the other participants to the venture. This is, however, a question of adjustment of the insurance

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78/ Gilmore and Black on "The Law of Admiralty", 2nd edition, The Fountain Press Inc, New York, 1975, p 270.

79/ Lowndes & Rudolf, op. cit., para 90.01.

80/ Op. cit.

conditions. There is no technical objection, for instance, to charging the hull underwriter with the risk of all extraordinary expenses incurred by the shipowner for the rescue of ship and cargo. Nor would it be difficult for the cargo underwriter to pay in full for the loss of cargo sacrificed for the common safety. It is essentially a question of adjustment of premiums, and of establishing an adequate reinsurance cover."81/

93. That conclusion is echoed also in a review of general average by the Comité Maritime International (CMI). The Report of the CMI Working Group on General Average in 1982 82/ concluded thus:

"It is clear from the comments received that there is no enthusiasm and very little support for a reform in general average, but that there is a considerable amount of support for reform of insurance arrangements to eliminate the disadvantages of the existing system. It is also clear that solutions to current problems are more likely to be found in new insurance arrangements than in other possible reforms either of the principles on which general average is based or of the law. It may be therefore that it would be inappropriate for the CMI to consider the subject further, at this stage at least, because the scope for legal reform is small and the subject is one which might be best discussed as a technical and service problem between insurance interests rather than by lawyers."

94. It seems that Lowndes and the 1982 CMI Working Group are of like mind with Professor Selmer that the way forward is not to change or reform the present system of general average distribution to meet the criticisms, but in effect to substitute for the system new insurance arrangements.

95. The conclusions of Professor Selmer to which reference has been made were based upon a consideration of the economic aspects of general average distribution. These conclusions on the economic aspect were also strongly influenced by questions of cost. However, in his book Selmer also considered in detail what he called the "psychological implications" of the system of general average distribution and in this connection he looked separately at the "Common Safety" rules and the "Common Benefit" rules. On the aspect of "Common Safety" he concluded:

"It is mainly contended in theory that the psychological implications of the reform (i.e., abolition) make it a very dangerous undertaking. If the cargo owners were to have no recourse against the ship when their goods had been sacrificed, shipowners and masters would be inclined to sacrifice cargo on a much larger scale than today.

81/ Ibid. p 289.

82/ Published in the CMI News Letter of June 1983.

> There are, however, many persons with practical experience in shipping and insurance who consider this fear to be greatly exaggerated. According to their view, there are so many other inhibitions against deliberately destroying cargo, and in practice so few possibilities of bringing the ship into safety by doing so, that an abolition of general average would have no such disastrous consequences .... The healthy effect of the so-called "common safety" apportionment is mainly fictitious, though the extended belief in such effects offers a strong foothold for the rules of distribution."83/

96. The "psychological" argument in favour of the "Common Benefit" rules he regarded as more persuasive and he acknowledged that equitable distribution of expenses which fell within the ambit of these rules did make it easier to arrive at practical arrangements regarding repairs and on-carriage. Nevertheless, he considered that the way in which such expenses were dealt with in general average was "very irrational" and advocated a solution by which each party insured their own disbursements as well as their own physical losses. Abolition of the "Common Benefit" rules, he thought, would actually encourage carriers to take better care of cargo.84/

97. The purpose of this chapter is to examine in more detail the basis for these conclusions, the arguments that are put forward in support of retention of the system and the complaints that have been directed against the system.

98. Most of these complaints or criticisms were listed in the Report of the General Average Committee to the Council of the International Union of Marine Insurance (IUMI) in 1948. The listed criticisms were the following:85/

"(a) The great increase in the size of ships and other developments in shipping and trade have caused highly involved and too laborious complications of adjustment.

(b) The trend has been to extend, rather than to limit the scope of general average, thus increasing the complexities of the subject instead of aiming at the rationalisation and simplification generally aspired to in modern development.

(c) Under the conditions referred to under (a) and with the trend mentioned under (b), unnecessary and sometimes excessive expenses occur too frequently. They fall under the categories of services, e g, agency fees, port of refuge charges, surveys, financing advances, and printing and adjustment fees.

(d) General average deposits cause excessive clerical work for all concerned.

(e) Complicated problems of currency arise when deposits are collected in different currencies or the general average adjustment is drawn up in a currency different from that of the country from or to which the goods are shipped or to that of the ship's home port.

83/ Op. cit., p 291.

84/ Ibid., p 292.

85/ The IUMI Committee Report, 1948, pp 1-2.

(f) The delays occurring in the winding-up of general average and the issue of adjustments, etc, carry with them risks of exchange fluctuations against which it is difficult for those who have financed the deposits to protect themselves.

(g) Depositors and others are liable to become involved in insolvency of ships' agents or shipowners, ...

(h) General average deposits are sometimes grossly over-estimated when fixing the amount to be deposited.

(i) Frequently experienced delays in the winding-up of general averages, in the issue of adjustments, and in the collection of general average contributions or distribution of refunds. These delays make it necessary to keep underwriting accounts open for indefinite periods, thus often obscuring the true position of such accounts or of individual hull or cargo statistics.

(j) High costs of commission and interest. The delays mentioned above are attributed to the present rules giving inducement to defer the closing of general averages.

(k) The difficulties experienced in arriving at both the proper contributory values of ship and cargo and the amounts to be made good in general average. These difficulties are enhanced when ship valuers, shipowners and other specialists hold different views as to the values for general average purposes, where cargoes are government-owned, or, through government measures, are held at artificial levels at port of destination.

(l) Failure to bring about unification of general average rules leads to increasing difficulties as cargoes under the same general average are nowadays often consigned to ports of discharge in different countries where different laws are applicable.

(m) That although the York/Antwerp Rules are widely adopted, they are not always construed in the same way by jurists and average adjusters in different countries. The varying national interpretations have with the years tended to increase existing divergencies in practice as well as in legal construction."

99. Having listed these criticisms in their report, the Committee of the IUMI analysed them and drew certain preliminary conclusions. The Committee felt that the fundamental principle of equity, inherent in general average, had not been touched upon and that the criticisms overlooked the fact that general average was essentially a principle of salvage. A "sacrifice" in a general average context was, they emphasized, no more than a means of salvage. The Committee further considered that the criticisms were directed against features which were "contingent to averages" and which would be present even if general average were abolished. Furthermore, the criticisms were mainly directed against deficiencies which had become apparent with modern developments in shipping and trade - deficiencies which it might be possible to eliminate or correct. It was also felt that the criticisms were to a great extent a manifestation of the failure to reach international uniformity on the rules governing general average and on the application of those rules. These preliminary conclusions were then elaborated upon by the Committee and the final conclusion reached was that "the principle of general average cannot be

abolished, and ... there are no adequate grounds for abolition of the application of the system ...". Any other system, the Committee concluded, would cause "insecurity, confusion and increased litigation". However, the criticisms were considered sufficiently well founded to justify the consideration of ways and means of simplification and reform.

100. Twenty years later an insurer noted,86/ not with specific reference to the UIMI report, but as a general comment, that discussion over the abolition of general average had always tended to be academic and that general average "has been regarded as an immutable part of maritime law". Reformist movements have thus tended to concentrate only on removing anomalies. As others 87/ have pointed out, the international conferences which have agreed on and revised the York-Antwerp Rules "have never entered into any principal discussion of the expediency of the institution. On the contrary, the work was carried forward by the wish to develop the institution in such a manner that it appears as harmonious and consistent as possible, in spite of the fact that this has led to ever-increasing complication of the settlements."88/

101. The reason for this has been put down by some to "vested interests"89/ and by others to "prejudice".90/ One insurer wrote 91/ in 1925 of "a vast amount of inertia to be overcome before the shipping and underwriting communities can be persuaded to tamper with the trammels of effete but time-honoured customs which are so opposed to modern ideals of economy and time, labour and money." Another, much earlier, was even more robust. He wrote,92/

> "The preposterous and overgrown snowball of abuses has rolled itself bigger and bigger, and still those irresponsible persons who have the rolling of it, but over whom it does not roll, exclaim enthusiastically that it must be rolled bigger yet ... Average adjusters and legal faddists vie with one another at the snowball rolling, and happy and distinguished is he who can succeed in sticking a fresh lump upon it."

86/ Article by V E Robertson, Underwriter of the Motor Union Insurance Company, in Lloyd's List, London, 7 October 1966.

87/ Selmer, op. cit., p 134; G R Rudolf, The York-Antwerp Rules, 1926, reproduced as Appendix 4 in the 9th edition of Lowndes and Rudolf, op. cit., para 1107.

88/ Selmer, op. cit., p 134.

89/ C H Johnson, General Average: Abolition, International Codification or Reform, in a paper read before the Insurance Institute of Liverpool, 11 February 1925, 28 J. Chartered Ins. Inst. 303, citing a statement by the Hon Secretary to the Maritime Section of the Stockholm Conference (Sanford D Cole), 1924.

90/ V E Robertson, Underwriter of the Motor Union Insurance Company, in a letter to the Editor of Lloyd's List, London, 14 July 1966.

91/ C H Johnson of the Thames and Mersey Marine Insurance Company in a paper read to the Insurance Institute of Liverpool, op. cit., p 303.

92/ Douglas Owen, Secretary of the Alliance Insurance Company, in a paper read at Lloyd's on 8 May 1894.

102. Not all attacks on the general average distribution system have been expressed so robustly. The 1982 CMI Working Group concluded more politely that "there is no enthusiasm and very little support for a reform in general average", although as the 1990 edition of Lowndes records,93/ "during the last hundred years or more there have been intermittent calls for abolition on various grounds". In the face of so much persistent criticism the case for retention of the general average distribution system must surely be analysed with particular care.

A. Equity

103. The IUMI Committee in 1948 clearly considered that equity and the historical basis of the institution of general average were the strongest reasons in favour of its retention. The Committee referred to equity as being "the fundamental principle which general average contains" and to the proven worth of general average "since the dawn of maritime commerce".94/ Few if any have quarrelled with the equitable principle. Selmer has acknowledged that one of the strongest reasons for the "remarkable power of life" of general average throughout the ages "is undoubtedly the appeal which the distribution of salvage costs carries in it." He goes on, "What has been sacrificed for the common good at a time of peril, should also be paid by common contribution. The justice and equity of this idea strikes one immediately. In fact, it is hardly possible to attack general average on points of principle. The distribution appeals so much to the intuitive sense of justice, that everybody must agree that a more fair system cannot be invented."95/ Not everyone however accepts that a long history is necessarily a recommendation for a secure future. As Lowndes has remarked:

> "The ancient principles of general average were so eminently fair and reasonable that they do not come under attack and need no defence, and if allowances in general average had remained as few and limited as under the Roman Civil Law [jettison of cargo and cutting away masts, etc], it is unlikely that any antipathy to the distribution system would have developed. With modern ships, cases of general average would have been of infrequent occurrence [probably less than 10% of the present number], and even were it wished to dismantle the system, this would have caused no insuperable problem, if only by reason of its limited application. What has given rise to the objections during the past 125 years is the ever-continuing increase in the number of situations which are held to be the proper subject of general average and the allowances which can be made. The process can be likened to the building of a wall, where each row of bricks forms the foundation for the next row. Each new allowance in general average can logically and legally be used as a sound precedent for yet further allowances."96/

93/ Op. cit., Appendix 5, The Future of General Average, para 90.02.

94/ Op. cit., p 7.

95/ Op. cit., p 121

96/ Op. cit., para 90.05.

104. Lowndes thus acknowledges that the general average distribution system, born of necessity, was eminently equitable and reasonable for those early days and that it would be difficult to fault it on any theoretical grounds. In agreement with Selmer, he has also pointed out that none of the attacks on the general average system attempt to challenge the equitable principle. But it goes on:

> "The central point of the argument for the abolitionists rests upon the fact that what was once a vital commercial necessity is no longer such, but, rather, a costly and unnecessary anachronism, sometimes taking several years to sort out and settle, when only as many months would be required to resolve matters if all sacrifices and expenditures were allowed to lie where they fell, and their sufferers transfer the risks to the broad shoulders of a more than adequate marine insurance market."97/

105. In favour of retention it may therefore be said that no-one challenges the essential fairness of the system, although the extent to which the weight of history is a relevant consideration is challenged. The question is whether the essential fairness of the system in itself justifies its continued use. In other words, are the benefits commensurate with the time and expense entailed in its application?

106. One matter that has been considered in this context is whether the equitable principle of general average has been applied to any other situation. Reference has been made 98/ to the situation in fire insurance where, in order to extinguish or limit the extent of a fire, it might be necessary to demolish part of the property and adjacent buildings. In such circumstances it has been suggested that one might expect an arrangement whereby those whose property was saved contributed to the losses suffered by those whose property was demolished, but no writer appears to have identified any legal system which gives rise to any such right of contribution. Selmer suggests that the reason why general average has been confined to maritime law is the existence of the community of danger established through the loading of a vessel with goods not belonging to the shipowner. He adds:99/

> "There is hardly any other situation where common danger occurs so frequently. In carriage by road or rail, the peril is less pronounced, and it usually threatens only the goods or the means of transport. In modern times carriage by air presents much the same picture as maritime transport. But air law has been developed without making use of the system of contribution."

107. In all these other situations, however, even though the occurrence of common danger may be less frequent, circumstances in which it would be fair and equitable to distribute sacrifices and expenses amongst the various interests involved do arise, but no system of distribution, such as general average, has evolved, and evidently there has been no pressure from commercial interests to establish any such system.

97/ Ibid., para 90.04.

98/ C H Johnson, op. cit., p 305.

99/ Op. cit., p 126.

B. **Ensuring unbiased action by Master in situation of danger**

108. In one of the strongest defences of the general average system it was said that the greatest difficulty in the way of abolition of general average was "the undesirability on grounds of public policy of interfering in any way with the discretion of the Master in time of peril."100/ This was also one of the most important factors which led the Committee of the IUMI in 1948 to conclude that general average could not and should not be abolished. The Committee wrote:

> "The general average principle served as a protection to the Master of the ship and to mariners against accusation of fraud or misconduct. It also gave the Master freedom of choice in determining the measures to be taken for the saving of the ship and cargo. He would not have enjoyed such freedom had he been burdened with the knowledge that because of a sacrifice he might be accused of culpability by the party or parties who alone suffered a loss.
>
> This second consideration is of just as much importance now as earlier. With modern ships of very high value carrying large quantities of cargo, sometimes of great worth, acts of sacrifice carry heavy economic consequences. The weight of the responsibility of the Master of the ship is in this respect as great as ever ... It seems obvious that the primary requisite for the successful management of the situation of peril is that the Master's mind is neither hampered by any regard to such economic considerations as would inevitably arise if general average were abolished, nor by the knowledge or fear that his action will be open to the displeaure of the shipowner, whose paid servant he is, or to criticism by cargo owners, exposing him to the risk of action for damages for alleged wilful or needless acts of jettison, of needlessly employing outside assistance or to other charges."101/

109. Selmer has examined these arguments in great detail.102/ He asserts that they rest on a number of dubious assumptions. In the first place he questions whether it is true that most Masters know the general average rules. He then questions the assumption that the apportionment of sacrifice under the current rules really does render irrelevant, from an economic point of view, where the sacrifice falls. He further questions whether in most general average situations there is in fact a real choice between several alternative ways of dealing with the situation of danger; and finally he expresses considerable doubt whether, even if Masters do know the economic consequences of their decisions under the general average distribution system, they do in fact make their decisions by reference to such economic considerations.

100/ G R Rudolf, op. cit., para 1106, p 485.

101/ Op. cit., p 4.

102/ Op. cit., pp 210-225.

110. The Chairman of one national association of average adjusters has asserted 103/ that those who have questioned the value in this respect of the general average system were of necessity unable to advance any practical evidence in support of their contention. He said:

> "It may be true, as has been suggested by some, that those in charge of vessels in situations of peril would, in the absence of general average contribution, continue to act, as they have done in the past, without regard to the conflicting interests of the owners of the property in their charge. This cannot, however, be demonstrated by past experience since the tradition of general average has in the past always underlain and supported their freedom of choice of action. In my view it can at the very least be said that a decision, for example, to jettison a large quantity of valuable cargo from a stranded vessel rather than drag her off a reef would be more likely to be questioned by those concerned in that cargo if they stood to suffer the whole of that loss by jettison and no part of the cost of alternative measures."104/

111. Selmer accepts that it is a difficult matter to prove, one way or the other, by reference to evidence. He considers, however, that a commonsense approach is justified. He expresses the opinion that, having regard to their training, ships' officers are likely to have a general knowledge as to the main principles of general average, although probably not any detailed knowledge. But he goes on:

> "In this connection one should bear in mind that ships' officers very rarely come into direct contact with the application of the general average rules. Their task is to bring the vessel safely into port. The general average settlement itself will take place very much later, when the shipowner has paid all the bills. The ships' officers rarely see the practical use of the theoretical knowledge they have acquired at school. It is therefore not very likely that their knowledge will be applied to any large extent."105/

112. On the other hand, he points out, in modern conditions shipowners and underwriters will very usually be in touch with the Master following a casualty and experts are often sent to the spot at an early stage. In such cases, therefore, he would acknowledge that those who are effectively taking the decisions will have a detailed knowledge of the general average system. The different interests will probably be represented so that it will not be the Master who takes the decisions, but the experts of the concerned interests.

113. On the question whether apportionment in general average really does make it irrelevant, from an economic point of view, where the sacrifice falls, Selmer is adamant that the current system of general average distribution does not make it irrelevant where the loss falls in the first place. He maintains that in a general average situation the shipowner will almost always be better off as a result of sacrifice of cargo than if there was a sacrifice affecting the ship. He states:

103/ John Crump in an address in 1969 to the British Association of Average Adjusters on "The Simplification of General Average", in From the Chair - Addresses by Chairmen of the Association of Average Adjusters, 1873-1976, The Association of Average Adjusters and Lloyd's of London Press Limited, London, 1978, p 83.

104/ Ibid., p 84.

105/ Selmer, op. cit., p 212.

"Regardless of the apportionment, general average damage to the vessel will hit the shipowner much harder than would corresponding damage to the cargo. This is due to the fact that neither the York-Antwerp Rules nor any national general average law grants the shipowner full compensation for the economic loss which he will invariably suffer when his vessel is damaged."106/

114. The shipowner will never, he asserts, be fully compensated for loss of time during repairs, save in poor market conditions, because the loss from delay will never be compensated by the running expenses recoverable in general average. Damage suffered by the cargo during the salvage operation, on the other hand, will seldom affect the shipowner at all. So Selmer concludes that even under the general average system of distribution and so-called equality of sacrifice, there will be strong motives to let the cargo suffer the damage, if there is a choice, and if economic motives do in fact affect the decisions made. However, Selmer challenges the view that there is in many cases any actual choice among the measures to be taken.107/ He accepts that in cases of stranding or grounding the opportunity to exercise choice is the most likely, but even here if independent salvors are called in on a "no cure - no pay" basis, as will often be the case, the choice of the salvage measures to be taken will seldom be the decision of the vessel's Master, but of the salvors' own Salvage Master. In other situations such as fire or collision, what Selmer refers to as "spontaneous leakage", mechanical breakdown or deck cargo problems (where there is no obvious port of refuge at hand), he asserts that the opportunity for real choice between sacrificing ship and sacrificing cargo will be rare.

115. Finally on this question Selmer argues that in a situation where danger is threatening and it is necessary to act quickly, a Master's basic instincts, first to save human life and then to do what "good seamanship" in its widest sense requires, are likely to override other considerations, and particularly economic considerations, even if there were no general average distribution system in place.108/

116. Lowndes appears to endorse these conclusions. In a discussion of the "public policy" argument and of the theory, implicit in the argument that the general average system acts as a watchdog or "guardian angel" for the protection of the cargo interests, Lowndes states:

"If a vessel runs aground while steaming ahead, and the bottom is soft, almost as a reflex action will the engine be put full astern and worked variously in efforts to refloat. Even if the bottom is of rock, after sounding the double bottom tanks and holds to check that there is no leakage, the engine will still be used in early efforts to refloat as a matter of routine seamanship, and it would appear, therefore, that the first cost of refloating is at the expense of the shipowner.

106/ Ibid., p 213.

107/ Ibid., p 214.

108/ Ibid., p 223.

> If the vessel is making more water than can be coped with by the ship's pumps, she would be better left where she is until salvage assistance and a diver to attend to the leak can be obtained. A hasty jettison, in any circumstances, will seldom achieve anything, for unless heavy anchors or ground tackle can be laid out aft, it is likely that the ship will merely drive further ashore as she is lightened. Alternatively, she could even be overcome by the leakage and sink in deep water."109/

117. After considering the unlikelihood of there having been any increase in deck cargo jettisons following the change in the York-Antwerp Rules in 1924, Lowndes continues:

> "Overall, it is seriously to be doubted whether there is much force in the public policy and guardian angel theory, but if unnecessary sacrifices of cargo were to occur (as a result of abolition), a few well publicised law suits against any offenders would doubtless do much to discourage such action. It is also to be noted that in many types of maritime accident, no purpose would be served or benefit arise from a sacrifice of cargo."110/

118. It appears therefore that there is considerable reason to question the main premise on which both the IUMI Committee in 1948 and other defenders of general average have based their argument against the abolition of the system.

C. Time and expense

119. As will be evident from the foregoing, many of the criticisms of general average centre on the complaint that the general average process involves excessive delay and needless expense. Those who favour the continuation of the system maintain that the delays involved and the expenses incurred would be much the same in the case of most casualties which give rise to general average, whether general average were abolished or not. The IUMI Committee in 1948 stated, for instance:

> "... the criticism of the general average system has to a large extent been aimed at difficulties which are inevitable features. With any of the proposed substitutes for general average, it would, frequently with the most common types of averages now treated as general, namely strandings, damages from collision, fire, or entering a port of refuge, be necessary to take the same measures which have been so severely criticised by some of the advocates of abolition. The formalities would, on the whole, have to be the same as those which from public policy are contained in different national laws. In order to enable salvage, its allied costs and expenditure to be properly apportioned, values of ship and cargo would have to be assessed, average bonds or deposits would also have to be obtained before cargo could be delivered. Neither physical occurrences in the operation of ships, or in the transportation of goods, nor the nature of accidents or of damages to ships and cargoes have been subject to any essential changes. The measures to avoid, to diminish or to ascertain values of ship and cargo would be the same after abolition of general average."111/

109/ Lowndes and Rudolf, op. cit., para 90.08.

110/ Ibid., para 90.09.

111/ Op. cit., p 14.

120. Selmer acknowledges that there is some truth in the IUMI contention. Some of the expert work which is charged in general average would still have to be done if other rules of settlement applied. He agrees that it is also possible that a mechanism somewhat like the general average arrangement might have to be used to a very limited extent to ascertain the shipowner's recourse against the cargo owners when the owner incurs expenses which exclusively benefit the cargo. Further, some of the work now carried out by the general average adjuster would presumably have to be done by others if the present distribution system were abandoned. Selmer goes on:

> "There is reason to believe however that these expenses will be small compared to the ones avoided. As emphasized by the IUMI Committee, it is true that the settlement of complicated averages involves and always will involve great costs. But only part of these costs will be found in the adjustments, and it is only these latter apparent settlement costs which we have in view here. The adjusters exercise relatively strict control of the allowable expenses. When an amount does really qualify for distribution, the chances are that it is compensation for some work which will be superfluous under the proposed alternative."112/

121. Moreover, although salvage money proper would still have to be apportioned between ship and cargo, Selmer asserts that the distribution of salvage money would involve a much lower percentage of costs than an apportionment in general average. He contends that the total amount for distribution is known in a salvage case and the contributory values may be based upon the values used in assessing the salvage award. The work necessary to effect a settlement is therefore far less than it would be if the general average losses were to be apportioned.

122. Emphasis has also been placed on the extra work involved for shippers, consignees and underwriters in the apportionment of sacrifices and expenses in general average. It has been said:

> "The surveying of damaged goods, allocation of amounts to be made good in general average, collection of deposits or arrangement of guarantees, obtaining of sound and damaged values of cargo and ship, and, finally, the gigantic task of adjustment involving a tremendous amount of detailed work, is reflected in the expenses which fall, in the long run, upon the already heavily laden underwriter. Furthermore, the shipowner, shipper and consignees experience much trouble and inconvenience in connection with the payment and collection of general average contributions, etc, for which they are not compensated ... The preparation of the adjustment alone, involving careful examination and analysis of repair accounts, survey reports, disbursements, contributing values of ship, cargo and freight, may extend over a period of several years, and even a small case may involve a delay of many months."113/

112/ Op. cit., p 161.

113/ C H Johnson, op. cit., p 310.

123. Selmer has asserted that it was not unusual for five to 10 years to elapse from the time of the average to the appearance of the adjustment. The Chairman of the British Association of Average Adjusters in May 1955 stated, following an investigation of moderately sized hull claims, that "the average period from the date of the casualty to the presentation of the claim was four-and-a-half years. Of this period the first 20 months represented the average time lost owing to the postponement of the repairs, the next 11 months were spent awaiting the issue of the surveyors' report, followed by the passage of a further 10 months before the first document in connection with the claim was submitted to the adjusters. The further time then occupied by the adjusters in collecting all the further documents and information required, and completing the adjustment, was 13 months."114/ A short time later a similar survey found that the time used by the adjusters had been reduced to seven months. Selmer acknowledges that if one is talking about the normal lapse of time between the casualty and the time when the loss has finally been adjusted for all the interests concerned, then the delay caused by the general average distribution is fairly insignificant. This is because, in the most frequent case, the adjustment of the hull claim is severely delayed by the sort of matters as referred to in the report of the Chairman of the British Association of Average Adjusters just quoted. But Selmer makes the point strongly that in the absence of a general average system, many interests would suffer little delay at all. Not all the interests would have to wait so long for a final adjustment.

> "When an insured has suffered a recoverable loss, the settlement is a matter exclusively between him and his underwriter. If for any reasons the settlement is drawn out, it may be inconvenient for the parties, but it does not concern others. General average on the other hand interlocks a number of insurance settlements. Until the contributions have been determined, the underwriters who have covered hull, freight and cargo cannot finally calculate their liability. This may be annoying even if the general average is settled without special delay. But if a dispute arises concerning a repair bill for general average damage to the vessel, neither the freight nor the cargo underwriters can close their accounts until this typical hull conflict has been finally settled. The delay thus spreads like rings on the water."115/

124. So far as the expense of general average adjustments is concerned, Selmer made a comparison of the various studies that had been carried out. An early study by an insurer came up with an average figure of 12% of the total general average claims.116/ Later in 1914 another insurer recorded a figure of 18.6%.117/ About the same time an average adjuster in New York took the figures from 12 unselected adjustments and found that the average was also

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114/ Association of Average Adjusters, Report of General Meeting, 12 May 1955, pp 6-7.

115/ Selmer, op. cit., p 170.

116/ W H Jarrett of the Commercial Union Assurance Company, Adelaide, in a paper read before the Insurance Institute of Victoria, 1890.

117/ W R Ray of the Insurance Society of Canton, Adelaide, in a paper read before the Insurance Institute of Victoria, 16 September 1914.

about 18%.118/ In 1925 an analysis was made by an insurer of 50 adjustments taken at random and reported an average of 12.5% of the total general average claims.119/ Selmer himself, analysing the adjustments carried out in respect of ships in the Norwegian fleet in 1952 and excluding one wholly out of the ordinary case, arrived at a figure of between 5.2% and 8%, predicting that a figure nearer the higher end would be the more realistic. He suggested that some of the earlier higher average figures might not be representative. However, he made the point that it was mainly the work done by adjusters that appeared in the adjustment as expense items and would be measured by statistical investigations. The work of others involved in the process although considerable was not fully measured, however. He said:

> "A shipowner, cargo owner or underwriter who in some way or other has to undertake office work in connection with the settlement, may not claim an allowance for increased overhead costs."120/

125. Such "hidden costs" have therefore to be taken into account and in Selmer's view not all of these by any means would have to be incurred if the general average distribution system were abolished.

D. Relationships between the interested parties

126. It is said that the general average system evolved at a time when it was the custom for merchants to travel with their cargoes, buying, selling and bartering their goods as the voyage progressed:

> "To the ancient Greek shipowners who first introduced it in their Mediterranean trading, the settlement of general average was a comparatively simple matter. Their small vessels probably carried as few as half a dozen shipments on each voyage and it was the custom in those days for merchants to travel with their goods. One can imagine, therefore, any general average loss suffered by the shipowner or one of the merchants being settled in the captain's cabin at the end of the voyage. If the shipowner (who might also be the master of the vessel) had sustained the loss, the various merchants would each give him appropriate items from their shipments, while if it were one of the merchants who had himself suffered (perhaps by jettison of his goods) the other merchants would treat him similarly and the master, on behalf of the ship, would presumably make some monetary payment."121/

127. Any voyage in those days was a truly hazardous adventure. "The equalization of the loss served a most necessary and useful function, for the merchants had probably invested the bulk of their fortunes in the one adventure, and there were no other insurance facilities whereby they could protect themselves against loss. The general average system, born of necessity, was eminently equitable and reasonable for those far-off days."122/ However:

118/ H K Fowler in an address as Chairman of the US Association of Average Adjusters, October 1914.

119/ C H Johnson, op. cit., p 312.

120/ Op. cit., pp 155 and 158.

121/ L J Buglass, op. cit., p 2.

122/ Lowndes & Rudolf, op. cit., paras 90.03 and 90.04.

"Today the position is very much more complex. A general cargo or container ship usually carries a few hundred shipments - sometimes over a thousand - all belonging to different shippers, none of whom, of course, travel with their goods. The total amount of money involved in the adventure runs into millions of dollars and it will be obvious that at the time the cargo is delivered at its destination the exact amounts to be contributed to any general average are not known. To ascertain how much each of the parties to the adventure will be called upon to pay, the shipowner employs an average adjuster - an expert versed in the law of general average - whose task it is to draw up the general average adjustment."123/

128. A merchant writing to the editor of Lloyd's List in 1966 has described the contrast with today. He wrote that "the relationship between the shipowner and the cargo owner is no longer that of partners in a harzardous adventure, but is merely as provider and user of a routine service."124/ From his point of view as a merchant, any revision obviating the documentary work consequent upon general average would, he said, be very warmly welcomed.

129. Selmer considers that the frictions which general average causes, especially in the relationship between shipowner and cargo owners, are a matter of very great importance when considering the merits of general average. "A businessman", he says, "expects that when his goods have arrived and the agreed freight has been paid, they shall be at his disposal without any further formalities or demands. This is the case in all other forms of transport either on land or in the air. If a vessel has been in trouble, however, the consignee must sign a general average bond or put up some security, and a settlement with his underwriter is forced upon him even if his own goods have suffered no damage at all.... The general average settlement complicates the liquidation of the contract of carriage and is certainly a strain on the good relationship between the parties. The shipowner is in fact not very interested in involving his customers, the charterers and the cargo owners, in the trouble and expenses inherent in the process of apportionment. Under special circumstances, the apportionment may be of vital importance for the shipowner, that is to say if his hull rating is at stake, but where this motive is not present, the shipowners will as a rule prefer that no apportionment is made, on the understanding, of course, that they get their own damage and expenses covered."125/

123/ L J Buglass, op. cit., p 2.

124/ Letter from P H Pinner of Gillespie Bros to the Editor of Lloyd's List, 30 August 1966.

125/ Op. cit., p 172.

Chapter VII

REVIEW OF ALTERNATIVES TO THE GENERAL AVERAGE SYSTEM

A. Alternative schemes

130. Those who are in favour of retaining the general average system of distribution maintain that any of the alternatives to the system that have been proposed from time to time are so seriously defective as to be unacceptable. The following is a list of five such schemes that have been proposed for the abolition of the general average distribution system.126/

131. The first scheme is that the ship would bear the burden of all general average sacrifices and expenditure and also make good all loss of or damage to the cargo.

132. In the context of the present Hague Rules and Hague-Visby Rules regimes127/ such a scheme would clearly be totally unacceptable to the ship interests. It would only merit any discussion at all in the context of the Hamburg Rules,128/ if they were to be widely adopted. The Hamburg Rules do not prevent the application of the general average system of distribution, but they do provide, under Article 24(2), that the provisions of the Convention relating to the liability of the carrier for loss of or damage to the goods are also to determine whether the consignee may refuse contribution in general average and they largely determine also the liability of the carrier to indemnify the consignee in respect of any general average contribution made or any salvage paid. Since under Article 5(1) of the Hamburg Rules the carrier is, save in the case of fire, liable to make good any loss of or damage to the cargo unless he can prove that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences", it will be a comparatively rare case in which the carrier will be able to recover any contribution in general average from cargo.

133. If, therefore, the Hamburg Rules are widely adopted, it is not inconceivable that a position might be reached in which it became acceptable to both ship and cargo interests that no general average adjustment should be drawn up save in fire cases. Alternatively it might lead to an acceptance of an alternative scheme along the lines of scheme 4 below.

134. The second scheme is that of a return to the "common safety" theory. This would in effect abolish all the rules which have been grafted onto the original concept of general average under the doctrine of "common benefit".

126/ Lowndes & Rudolf, op. cit., paras 90.11-90.25.

127/ The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules) and the Hague Rules as amended by the Brussels Protocol of 1968 (Hague-Visby Rules).

128/ The United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

135. Lowndes considers that this would not command general acceptance. It would only eliminate a very few general average situations and the considerably reduced general average allowances would fall largely upon the shipowner.129/ Selmer takes the same view, categorising such an idea as being more romantic than practical:

> "One may be in favour of the 'common benefit' doctrine or not, but anyhow, it is obvious that the rules derived from it fulfil practical needs within the framework of general average. By suppressing the "common benefit" distribution, one would admittedly reduce somewhat the number of general average adjustments. But none of the other inconveniences would be eliminated. On the contrary, new problems would be created, such as the distinction between a call at a port of refuge necessitated by 'actual danger', and one which was only necessary 'for the safe prosecution of the voyage.'"130/

136. The third scheme is that sacrifices should lie where they fall, but that expenditure should continue to be apportioned. This was the solution advocated by at least one member of the 1982 CMI Working Group.131/ It was also supported by early advocates of partial abolition:

> "... sacrifices of ship should be borne by the shipowner or his underwriters, and, similarly, sacrifices of cargo would fall upon the cargo owners or the insurers. In short, there would not be any liability upon the parties to the adventure to contribute to the sacrifices of other interests for the common good, such losses being borne by the underwriters concerned, or, in the event of the property being uninsured, by the owners. Expenses incurred for the common safety represent a sacrifice equally with the sacrifice of property, but it is not suggested that contribution for general average expenditure should be abolished, for it is generally realised, as these expenses are almost invariably incurred by the shipowner, that hardship would be inflicted upon him or upon his underwriters."132/

137. It was further considered that even though, with an adjustment of expenditure, adjustments would still be required, the adjustments would be neither so voluminous nor so intricate, and consequently, could be issued with more despatch and less expense. Neither Selmer nor Lowndes agree that such a solution would reduce the number of adjustments to any extent because expenditure is likely to be incurred in nearly every case. However, Lowndes considers that it could be a first step towards total abolition. This argument advocates that:

129/ Lowndes & Rudolf, op. cit., para 90.13.

130/ Selmer, op. cit., p 148.

131/ Op. cit., para 4.7.

132/ C H Johnson, op. cit., p 312. See also Douglas Owen in a paper read at Lloyd's on 9 May 1894.

"The cargo interests and their insurers would bear any losses caused by jettison, or by the means to extinguish a fire, or by a forced discharge - as they do at present - but would relinquish their rights of recourse in general average against the shipowner and the other cargo interests. For their part, the shipowners and their insurers would bear the cost of repairing damage to the ship caused by the means used to refloat, or to extinguish a fire, etc, again without rights of recourse against the cargo. Such a move would assist considerably in the simplification of the large fire, stranding and jettison type of adjustments, for there would no longer be any need to distinguish between accidental and intentional damage, either to the ship or cargo."133/

138. The fourth scheme is that all sacrifices and all expenses should be allowed to lie where they fall: in other words that there should be a complete abolition of the whole general average distribution system. This is the course advocated by Selmer, by some of the members of the 1982 CMI Working Group on general average and indeed, with some reservations, by the current editors of Lowndes themselves. The latter dismiss as "misguided" the fear that ships' Masters might jettison cargo rather than incur an expense that would fall upon the shipowner, but do consider that simple abolition of the whole general average distribution system would suffer from one grave disadvantage. They take by way of example the case of a ship with a residual (damaged) value of 1,000,000 carrying a cargo worth 5,000,000 and go on:

"In the event of a very severe casualty, it would obviously be worth spending 2,000,000 or more to save the adventure as a whole, but under existing legal principles the shipowner would be entitled to abandon the voyage and throw in his hand if he were obliged to bear this expenditure. From his own financial stand-point, no expenditure of more than 1,000,000 could be justified.

That valuable property worth 6,000,000 should be left to rot or be lost is unthinkable, and the services of professional salvors under a Lloyd's open form of salvage agreement would no doubt be arranged. But if those salvors are obliged to seek security for and prosecute their claims for salvage against each separate property interest saved, problems similar to (or worse than) those in the existing general average distribution system will again be reintroduced."134/

139. Lowndes therefore suggests that if the general average distribution system is to be abolished, it would be essential to ensure that such abolition could not be circumvented by an alternative distribution system such as salvage: the shipowner would also have to be responsible for salvage applicable to cargo. This, it is said, "could not be wholly achieved with current hull insurance conditions, nor within the normal insured value of any vessel, and a special and additional policy of insurance would be required by the shipowner to cover what under existing practice would be considered as general average attaching to cargo."135/

133/ Lowndes & Rudolf, op. cit., para 90.22.

134/ Ibid., paras 90.15 and 90.16.

135/ Ibid., para 90.16.

140. It is therefore suggested, as an initial measure, abolition of general average and salvage if the total amount involved were less than a given sum and thus a restriction of any general average distribution to the major casualties.

141. As a step beyond, a special insurance arrangement is envisaged with the premium being payable either by the shipowners themselves or by cargo interests as a surcharge on the freight. As to the possible figure below which no general average or salvage distribution would take place, it is submitted that: "Without the necessary statistics, it is impossible to suggest what this sum might be, but in the case of a typical ocean-going cargo liner, it is possible to visualise that it could be in the $250,000/$500,000 range. If this were so, such a scheme would obviate the need to distribute the general average in a considerable number of the cases presently undertaken."136/

142. Selmer is not so much concerned with the fear that with abolition, valuable cargoes would be left to rot, although he does recognise the value of the "common benefit" rules in assisting the completion of the voyage following a casualty but he rather considers that the shipowners' legal obligations towards cargo and the limited scope of the circumstances in which shipowners are legally justified in abandoning a voyage exert sufficient control.137/ Unlike Lowndes, Selmer advocates that the respective liabilities of ship and cargo for salvage be retained and not be abolished with the abolition which he advocates of the general average distribution system. Selmer considers that the practical advantages of retaining the current liabilities of ship and cargo for salvage outweigh the disadvantages. As for those disadvantages, he says:

> "The drawbacks will however be far less than those attached to the present full apportionment (of general average). In the first place, the amount will always be known (salvage money with interest and expenses for negotiations or legal proceedings). As contributory values it will as a rule be sufficient to use the values which have formed the basis for the Judge or arbitrator when he determined the salvage money. In this manner one will also avoid the anomaly which at times is met with today, that salvage money is stipulated on the basis of one set of values, and that the apportionment takes place on the basis of some quite different values. The apportionment can also be done quickly, and the risk of intervening movements in the rates of exchange will be correspondingly less."138/

143. The fifth scheme considered is that the bill of lading should also serve as a cargo insurance policy which would pay all damage to the goods, whether caused by accident or sacrifice, and any general average contribution. 139/

136/ Ibid., para 90.24.

137/ Op. cit., pp 239-241.

138/ Ibid., p 203.

139/ Lowndes & Rudolf, op. cit., para 90.17.

144. Such a scheme would also avoid the general average distribution altogether, but as it is stated, the concept of the insured bill of lading is strenuously opposed by large trading companies with good claims experience who prefer dealing direct with insurers of their own choosing.140/ An insured bill of lading scheme has been much discussed in recent years, but there is little reason to doubt that the conclusion reached by the General Average Committee of the IUMI in 1948 was correct, namely, that the idea is "founded on reasoning which neither takes into consideration a number of factual circumstances, nor regards the lessons of practical experience regarding freight market, marine insurance, shipping, trade and financing, which show that this scheme is Utopian."141/

B. Uninsured interests

145. Those who advocate the abolition of the general average distribution system argue that appropriate new insurance arrangements would be much more efficient and much less costly in solving the problems which the general average system is supposed to address. Thus, as one of the members of the 1982 CMI Working Group stated, "Amounts made good and the apportionment of the general average fund are today little more than complicated ways of re-allocating risks between insurers. When, as is usual today, all interests are fully insured, the nature of general average and its financial consequences are no longer what they were when there was less insurance or no insurance cover."142/ In its conclusions, the Working Group supported "reform of the insurance arrangements to eliminate the disadvantages of the existing system."

146. The IUMI Committee in 1948, however, considered the assertion that cargo and vessels are insured more often today than when the York-Antwerp Rules were shaped to be not sufficiently supported by fact, and that this greatly weakened the case for abolition. The Committee expressed doubts over the assumption that the uninsured element was negligible or, if general average were abolished, that the interests who chose not to have their cargo insured would agree either to insure their cargoes or to bear losses of a general average or salvage nature themselves.143/

147. A similar point was made by a commentator in Lloyd's List in 1966 who reckoned that a considerable proportion of ships and cargoes were not insured or were insured only on restrictive terms.144/ This view, however, has not been shared by others.145/ One wrote:

140/ Ibid.

141/ Op. cit., p 10.

142/ Op. cit., para 4.4.

143/ Op. cit., p 6.

144/ D B B Johnson, in a letter to the Editor of Lloyd's List, 6 June 1966.

145/ G R Rudolf, op. cit., para 1102, p 483; C H Johnson, op. cit.

"The opponents of abolition almost invariably preface their views by the following argument: that an uninsured owner of property sacrificed, whether it be ship, freight or goods, would be prejudiced by the deprivation of his rights of contribution from other parties. Superficially, this appears to be a sound argument, but the shipper who does not insure his property afloat is singularly uncommon, particularly as present-day banking arrangements have made the marine insurance policy or certificate one of the essential documents for negotiation. It is a very fair assumption that the owner who is willing to run his vessel uninsured or the merchant to run the perils of the seas, would be prepared to accept the additional chance that his goods may be sacrificed for the safety of all concerned which, as it has been shown, is not a very serious risk. Further, this disadvantage is compensated to a very great extent by the fact that he will not be liable to contribute to make good the general average losses of others."146/

148. Selmer takes a somewhat similar view. He acknowledges that uninsured values do occur to a considerable extent both on the owners and on the cargo side. He points out that some shipowners prefer to carry a greater part of the risk than the customary deductions but maintains that it is very rare to find an owner who would carry the whole of the hull risk himself. He goes on:

"For the individual shipowner, purely economic considerations will be decisive when he chooses his type of hull cover. An abolition of general average will undoubtedly affect the risk inherent in big deductions. The shipowner must then carry alone salvage costs which do not exceed the agreed amount, but which previously he could at least partly pass on to the cargo owners. On the other hand he will avoid claims for a contribution from cargo. The result of this may be that the individual ownerships will reconsider their insurance covers, but those who will still prefer big deductions will suffer no injustice through the reform."147/

149. So far as cargo is concerned, Selmer draws the distinction between cargo owners who take a conscious decision not to insure and those who merely fail to do so for one reason or another. For the latter, he recognizes that general average constitutes a real protection but comments that these cargo owners must also contribute themselves and that overall they are unlikely to benefit because his statistical investigation showed that on balance the ship interests benefited more from the general average distribution system than did the cargo interests. So far as the former are concerned, he states:

"For the cargo owner who deliberately abstains from covering insurance - whether this is due to a careful weighing of the chances or a longing to run hazardous risks - the situation is exactly the same one as it is for the shipowner who trades with big deductions. There is no reason to maintain general average for their benefit."148/

146/ C H Johnson, op. cit., p 315.

147/ Op. cit., p 192.

148/ Ibid., p 193.

C. Legal considerations

1. Clausing of bills of lading

150. In some jurisdictions rights in general average are regarded as stemming from the law merchant, independently of contract. Nevertheless most claims for general average contribution today are based upon contract by virtue of clauses in bills of lading and other contracts of carriage requiring general average to be adjusted in accordance with the York-Antwerp Rules. Advocates of the abolition of the general average distribution system have suggested that abolition could be effected by quite simple clauses inserted in bills of lading and other contracts of carriage. For instance, one of the members of the 1982 CMI Working Group on General Average suggested that a clause in terms as follows would be adequate:

> "The parties to this contract will neither claim contribution nor contribute in general average."149/

151. Lowndes has suggested the following possible draft clause to effect a partial abolition of general average:

> "General average to be adjusted in accordance with the York-Antwerp Rules 1974 except that:
>
> (a) Loss of and/or damage to ship, cargo, or other property caused by general average sacrifice shall be borne by the party suffering the loss without recourse against the other contributing interests.
>
> (b) The shipowner to bear the first $/£..... of any general average expenditure and/or salvage and only the excess of this sum to be apportioned between the contributing interests."150/

152. Opponents of abolition have questioned whether a bill of lading clause in a contract between a shipper and a shipowner would be effective as between one shipper and another. The 1948 Committee of the IUMI suggested that a voluntary agreement between a shipowner and a shipper to abandon general average rights would not affect the legal position with other shippers, since there was no contractual relationship between the various shippers.151/ An insurer commenting upon a similar criticism in 1925 pointed to the existence of general average absorption clauses (or their equivalent), saying:

> "A fact which has some bearing on the point is, that it is not unusual at the present time for liner bills of lading to stipulate that, unless the general average losses reach a certain sum, an adjustment will not be made - on the grounds that it is not worth the expense of adjustment. This is an apt illustration of allowing the loss to lie where it falls, because either the shipowner, shipper, or their underwriters have to make good such losses without any right of recovery from other parties. It differs only in degree from the total abolition for contribution to general average sacrifices."152/

149/ Op. cit., para 4.4.

150/ Op. cit., para 90.26.

151/ Op. cit., p 13.

152/ C H Johnson, op. cit., p 317.

153. If such a clause would not be binding as between one shipper and another, neither would a clause requiring general average to be adjusted in accordance with the York-Antwerp Rules be binding as between one shipper and another. On this point it is stated in Lowndes: "Where two shippers have each agreed with the shipowner that the Rules shall apply, and one shipper claims general average contribution from the other shipper, it is submitted that the Rules apply as a matter of implied contract between them."153/

154. The authority cited in support of that proposition is Castle Insurance v Hong Kong Shipping Co.154/ It is suggested therefore that a clause in a bill of lading or other contract of carriage abandoning rights of contribution in general average would be binding as between one shipper and another upon similar principles.

2. Hague Rules, Hague/Visby Rules and Hamburg Rules

155. Most contracts of carriage today are contractually subject to the York-Antwerp Rules, Rule D of which provides:

> "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault."

156. As is pointed out,155/ the first part of Rule D permits an adjustment to be prepared on the assumption that the casualty occurred without the fault of any party to the adventure. The second part of the Rule then operates as a proviso to the first, enabling the prima facie rights of the parties derived under the first part to be defeated by the remedies which are preserved by the second part. Where the contract of carriage is subject to the Hague Rules or the Hague-Visby Rules and the casualty giving rise to the general average is attributable, for instance, to a failure on the part of the shipowner to exercise due diligence to make the ship seaworthy, an adjustment of general average may be drawn up, but the cargo interests will be entitled to refuse payment of any general average contribution demanded of them. In a not insignificant number of cases today, demands by shipowners for contribution in general average from cargo are resisted by cargo on the grounds that the general average was brought about by a breach of the contract of carriage on the part of the shipowner.

157. When the Hamburg Rules are brought into force, and become applicable to bills of lading, it seems probable as has been suggested earlier,156/ that the number of cases in which a shipowner will be able to force a claim for contribution in general average under the York-Antwerp Rules will be

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153/ Lowndes & Rudolf, op. cit., para 90.11.

154/ (1984) A.C. 226 (P.C.).

155/ Lowndes & Rudolf, op. cit., paras D.23-24.

156/ See paras 132-133 of this report.

limited. By virtue of Articles 5(1) and 24(2) of the Hamburg Rules, cargo will be required to contribute in general average only if the carrier can prove "that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". One commentator has pointed out in this regard:

> "In addition to the burden of proof rule in Article 5(1), cargo may also invoke the general presumption of fault, or neglect enumerated in ... the Hamburg Rules. These Rules apply in all situations except where the general average act has as its origin a fire. Under Article 5(4) cargo must show that such a fire arose from the fault or neglect of the carrier or of his servants or agents. Thus, under the Hamburg Rules, the shipowner will no longer be able to rebut cargo's evidence of unseaworthiness by showing that he had exercised due diligence to make the vessel seaworthy. Except in fire situations, the Hamburg Rules make it very difficult for a shipowner to collect cargo's general average contribution. This impediment to the enforcement of an average statement could cause a substantial reduction in the use of general average ..." 157/

D. Effects of abolition on the parties involved

158. It has been suggested that for the general average distribution system to be abolished either in whole or in part, certain essential requirements would have to be fulfilled, namely:

> "1. Abolition or abatement of general average cannot be forced upon the mercantile community; it can come about only if the ship and cargo interests actively desire it, or can be persuaded of the potential benefits which will accrue to them, personally, by such abolition or abatement;
>
> 2. Ship and cargo interests will only desire an abolition of the general average distribution system if they are placed in as good a financial position under any new scheme as they enjoy at present. In other words, the parties would expect to recover direct from their insurers any claims or allowances which they presently receive in general average (e g, the shipowner would still expect to recover the wages and maintenance of his crew, etc).
>
> 3. Insurance premiums and freight rates should not be increased (or any increase in freight rates must be compensated by an equivalent decrease in the cargo insurance premiums)." 158/

159. Two comments might be made about this statement: firstly that it begs the question whether the existing system is fair as between ship and cargo (which Selmer disputes) 159/ and secondly that it ignores the position of hull, cargo and P & I underwriters. So far as concerns the latter, an insurer has expressed the view that:

157/ Patrick Johnson, Jr, "A Comparison of General Average Law and the Status of Average Adjusters in Sweden and the United States", Journal of Maritime Law and Commerce, Vol 12, No 3, April 1981, p 363, at p 385.

158/ Lowndes & Rudolf, op. cit. para 90.11.

159/ Op. cit., p 122; p 213.

> "Underwriters may not always call the tune, but it usually falls to their lot to pay the piper, and it may be that an exhaustive analysis of payments will show that in foregoing rights of contribution from other parties, a slight additional burden will fall upon them. However, unless it is considerable, it will be outweighed by the advantages that one payment is sufficient to close the case, in that the claim is not aggravated by long delays and the increased cost of adjustment, combined with greater economies of clerical labour, etc."160/

160. Another insurer writing to the editor of Lloyd's List in 1966 likewise was of the opinion that the parties having least to gain from the retention of the general average system and the most to gain from its abolition were underwriters themselves. He wrote: "General average adjustments are costly in time (up to seven years in some cases), in money, in distorting underwriters' statistics and furnishing a 'tail', in retarding speedy settlement of claims - and to what purpose? In the end it all comes out of underwriters' pockets."161/

161. Selmer takes the view that abolition of the general average apportionment would not seriously affect the present balance between the various branches of marine insurance, provided that abolition did not include salvage proper. His study of Scandinavian figures seemed to confirm that hull underwriters make a moderate profit on the distribution of general average and so if the profit were eliminated, hull premiums would perhaps rise slightly.162/

162. This accords with the view expressed by a leading authority on United States law which notes that "most general average acts are ships' acts, giving rise to a right of contribution running in the ship's favour against cargo; whatever may have been the case in the mediaeval wine trade, general average now is mainly ships' doctrine."163/

163. Selmer suggests that the resulting rise in the general level of freight would theoretically be more than compensated by reduced cargo insurance premiums. There would also be the saving in cost and time of the adjustment of general average which would benefit the whole commercial world.164/

164. Selmer's solution, it will be remembered, is for complete abolition of the general average distribution system and retention only of the distribution of salvage.165/ So far as the "common safety" principle is concerned, any sacrifice, including the cost of seeking a port of refuge and staying there,

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160/ C H Johnson, op. cit., p 318.

161/ Thomas Poole, in a letter to the Editor of Lloyd's List, 31 May 1966.

162/ Selmer, op. cit., p 290.

163/ Gilmore and Black, op. cit., p 248.

164/ Op. cit., p 290.

165/ Ibid., p 294.

would, following abolition, be borne by the party suffering the loss or incurring the expenditure. Only when salvage is incurred would a proportional distribution take place. But his recommendation is that the shipowner (or rather the hull underwriter) should for practical reasons pay in full all minor salvage awards not exceeding an agreed percentage of the hull value. This would obviously require adjustments in existing hull, freight and cargo policies and would require also a waiver of recourse for salvage expenses.

165. So far as the "common benefit" principle is concerned, abolition would require that the shipowner would be able to insure the extra expenses he had to incur. Selmer acknowledges that the abolition of general average distribution might result in new clauses being introduced into bills of lading and charter parties, giving the carrier the right to recover extraordinary expenses from the cargo interests, but he does not consider that this would be a major drawback to abolition. Much would depend upon the width of the insurance cover available to the shipowner, he believes.166/

166. The IUMI Committee in 1948 was sceptical. It considered that if general average apportionment of expenditure were abolished there would be a tendency at first, and soon a practice, for shipowners to pay little or no attention to the cargo and to concentrate on the vessel. They too anticipated that shipowners would provide in their bills of lading for the collection of extra charges from cargo and they questioned how owners would be able to collect such charges or how they would apportion them. These potential difficulties seemed to them additional grounds for retaining the existing system.167/

167. This view, Selmer considers, gives too little weight to the control imposed by legal obligations under contracts of carriage and to liabilities which will result in failures to care for cargo. Certainly some members of the 1982 CMI Working Group obviously felt that the matter could be satisfactorily dealt with by appropriate insurance arrangements. One member considered that the matter could be dealt with in the following manner:

> "If non-contribution clauses were to be inserted by mutual agreement in the shipping documents, these would have the effect of abolishing general average, and the losses and expenses normally the subject of general average, being deliberately rather than fortuitously brought about, would not be recoverable under insurance policies. However, if the hull and cargo policies were to be altered to allow for this, the physical loss of or damage to cargo would fall naturally under the conventional cargo policy and similarly the physical loss of or damage to hull would attach to the hull policy. The shipowners' extra expenses do not fit so easily into this pattern but an extended freight or disbursement policy could accommodate them."168/

166/ Ibid.

167/ Op. cit., p 12.

168/ Op. cit., para 4.4.

Part three

Chapter VIII

CONCLUSIONS AND RECOMMENDATIONS

168. As stated earlier,169/ the Working Group on International Shipping Legislation (WGISL), in drawing up its work programme had before it a report prepared by the secretariat which posed the following questions:

(a) Whether it would be an advantage "to abolish general average altogether and let the loss lie where it falls so that the particular underwriter of the interest concerned bears the burden";

(b) "Whether it might be advisable to study the prospects of simplifying general average procedures"; and

(c) Whether it might be advisable "to study the reduction or abolition of contributions in selected instances where the equitable principle of beneficiaries absorbing costs incurred in their common interest may be found to have least value".

169. In the material reviewed in part two of this report, the case for retaining the general average distribution system may not be thought to have been convincingly made out. But those in favour of retention suggest, when the question of abolition is raised, that there does not appear to be any real pressure for abolition. The Chairman of the British Association of Average Adjusters in his address on this subject in 1969 said:

> "There is little evidence at present that commercial interests generally seek such an extreme solution ... If there were enough demand from shipowners generally for this solution, they could insist on amending contracts of affreightment accordingly. Equally if there was sufficient demand among merchants or their underwriters, they could bring pressure for similar amendments."170/

170. It was likewise noted in an earlier strong defence of general average that at the Stockholm Conference at which the York-Antwerp Rules 1924 were finally agreed, "No single representative of the shipping or underwriting interests present suggested, let alone advocated, the abolition of general average - a strong testimony, it would seem, that those most intimately concerned recognized the value of leaving the equitable principles of general average undisturbed."171/

169/ See para 2 of this report.

170/ John Crump. The Simplification of General Average, op. cit., p 84.

171/ G R Rudolf, op. cit., para 1107, p 486.

171. Yet the following year a strong critic of the system recorded that:

> "The Honorary Secretary of the Maritime Section of the Stockholm Conference (Sanford D Cole), whilst admitting that the logical method of reforming general average was its abolition, suggested that the real obstacle to that course of action was 'vested interests'."172/

172. Some might think this to be borne out by the following passage from a well-known book by a prominent member of the Association of Average Adjusters of the United States:

> "To shippers and consignees of cargo, general average often seems to be an unmitigated nuisance while shipowners do not exactly welcome the extra work and responsibility which falls upon them when a general average has to be declared. On the other hand, average adjusters (marine insurance specialists) look upon general average with the respect due to this important source of their livelihood."173/

173. There is, in fact, as is evidenced from this report, a long history of calls for abolition of the system of general average distribution going back to 1877. The most comprehensive analysis of the general average system ever undertaken, that by Professor Knut Selmer, whose work has frequently been cited in this report, concluded that abolition was the best course. The report by the CMI Working Group on General Average in 1982 appears to favour the elaboration of new insurance arrangements which would effectively eliminate the necessity for the present general average distribution system; and the editors of the 1990 edition of Lowndes and Rudolf on "The Law of General Average and The York-Antwerp Rules" clearly favour an almost complete abolition of both the general average and the salvage distribution system with, again, the introduction of new insurance to cover the losses and expenses which would result from casualties of a general average and salvage nature. Having speculated on what the cost of insuring general average and salvage expenditure in a typical case might be, they conclude:

> "Would this not be a cheap price to pay to avoid all the extra trouble, expense and delay to both ship and cargo interests associated with a large multi bill of lading general average situation?
>
> No longer would the carriage of goods by sea be subject to the anachronistic trappings of a by-gone age; the costly distribution of losses and 'salvage' expenses could be dispensed with, and the system brought up to date and in line with a similar carriage by road, rail or air, where losses lie where they fall and the carrier endeavours to complete the transit without need to 'pass round the hat'."174/

172/ C H Johnson, op. cit., p 317.

173/ L J Buglass, General Average and The York-Antwerp Rules 1974, American Law and Practice, op. cit., p 1.

174/ Op. cit., para 90.25.

174. So far as the secretariat is aware, there has as yet been no organized discussion of the subject between insurance interests such as had been advocated by the 1982 CMI Working Group. Accordingly, it seems premature for the WGISL to consider questions of the simplification or reform of general average until, as the 1982 CMI Committee had suggested, the "technical and service" problems have been thoroughly discussed by the insurance interests concerned.

175. It is therefore recommended that, in consultation with CMI, the UNCTAD secretariat should approach insurance interests with a view to setting up and organizing investigations and discussions between the insurance interests concerned, in order to ascertain whether new insurance arrangements could be brought into being which would allow the abolition of the existing general average system.

176. If new insurance arrangements could, in practical terms, provide a more efficient and less costly alternative to the general average system, then investigations would have to be made into the best means of effecting abolition of the existing system.

177. If, on the other hand, the insurance interests were to conclude after thorough investigation and discussion that there is no possible insurance solution, it would then be appropriate to consider, as a second stage, how best the existing general average system and the York-Antwerp Rules might be simplified, reformed (whether by way of partial abolition or otherwise) or updated.

THE YORK-ANTWERP RULES 1974, AS AMENDED 1990

Rule of Interpretation

In the adjustment of general average the following lettered and numbered Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

Except as provided by the numbered Rules, general average shall be adjusted according to the lettered Rules.

Rule A

There is a general average when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

Rule B

General average sacrifices and expenses shall be borne by the different contributing interests on the basis hereinafter provided.

Rule C

Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.

Rule D

Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

Rule E

The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

Rule F

Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.

Rule G

General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

Rule I - Jettison of Cargo

No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognized custom of the trade.

Rule II - Damage by Jettison and Sacrifice for the Common Safety

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III - Extinguishing Fire on Shipboard

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage by smoke or heat however caused.

Rule IV - Cutting away Wreck

Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be made good as general average.

Rule V - Voluntary Stranding

When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage shall be allowed in general average.

Rule VI - Salvage

(a) Expenditure incurred by the parties to the adventure in the nature of Salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

(b) Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.

Rule VII - Damage to Machinery and Boilers

Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be made good as general average.

Rule VIII - Expenses lightening a Ship when Ashore, and Consequent Damage

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX - Ship's Materials and Stores Burnt for Fuel

Ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of fuel that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be credited to the general average.

Rule X - Expenses at Port of Refuge, etc

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be admitted as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

(b) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be admitted as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.

The cost of handling on board or discharging cargo, fuel or stores shall not be admissible as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

(c) Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be admitted as general average.

But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be admitted as general average only up to the date of the ship's condemnation of or the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Rule XI - Wages and Maintenance of Crew and other Expenses bearing up for and in a Port of Refuge, etc

(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average.

Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed during the extra detention for repairs to damages so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.

When the ship is condemned or does not proceed on her original voyage, wages and maintenance of the master, officers and crew and fuel and stores consumed shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms or articles of employment.

(d) When overtime is paid to the master, officers or crew for maintenance of the ship or repairs, the cost of which is not allowable in general average, such overtime shall be allowed in general average only up to the saving in expense which would have been incurred and admitted as general average, had such overtime not been incurred.

Rule XII - Damage to Cargo in Discharging, etc

Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging storing, reloading and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

Rule XIII - Deductions from Cost of Repairs

Repairs to be allowed in general average shall not be subject to deductions in respect of "new for old" where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship.

No deduction shall be made in respect of provisions, stores, anchors and chain cables.

Drydock and slipway dues and costs of shifting the ship shall be allowed in full.

The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.

Rule XIV - Temporary Repairs

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.

Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.

No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

Rule XV - Loss of Freight

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI - Amount to be made good for Cargo Lost or Damaged by Sacrifice

The amount to be made good as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby, based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.

When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be made good in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

Rule XVII - Contributory Values

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge. The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charter-party to which the ship may be committed.

To these values shall be added the amount made good as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount made good as general average.

Passengers' luggage and personal effects not shipped under bill of lading shall not contribute in general average.

Rule XVIII - Damage to Ship

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:

(a) When repaired or replaced.

The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;

(b) When not repaired or replaced.

The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

Rule XIX - Undeclared or Wrongfully Declared Cargo

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

Rule XX - Provision of Funds

A commission of 2 per cent on general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average, but when the funds are not provided by any of the contributing interests, the necessary cost of obtaining the funds required by means of a bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.

The cost of insuring money advanced to pay for general average disbursements shall also be allowed in general average.

Rule XXI - Interest on Losses made good in General Average

Interest shall be allowed on expenditure, sacrifices and allowances charged to general average at the rate of 7 per cent per annum, until the date of the general average statement, due allowance being made for any interim reimbursement from the contributory interests or from the general average deposit fund.

Rule XXII - Treatment of Cash Deposits

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect to which the deposits have been collected. Payments on account or refund of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.